

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

MOTION TO COMPEL / MOTION TO STAY

JUNE 16, 2010

HONORABLE DAVID W. DANIEL, PRESIDING

APPEARANCES:

MR. PAUL RICHTER
KENYON & KENYON
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ONE BROADWAY
NEW YORK, NY 10004-1007
(FOR THE PLAINTIFF)

MR. RICHARD S. GRESALFI
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1 APPEARANCES: (CONT.)

2 MS. ANNE ELISE HEROLD LI
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8 MR. JAMES L. GALE
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22 MS. VINITA FERRERA
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27 MR. ALLEN C. NUNNALLY
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41 SHARON K. KROEGER, COURT REPORTER
42 MACHINE SHORTHAND REPORTER, COMPUTER AIDED TRANSCRIPTION

1 THE COURT: GOOD MORNING, LADIES AND
2 GENTLEMEN.

3 MR. RICHTER: GOOD MORNING, YOUR HONOR.

4 MR. BASSETT: GOOD MORNING, YOUR HONOR.

5 THE COURT: ALL RIGHT. MS. BUNN, IF YOU WOULD
6 PLEASE CALL THE CELLECTIS VERSUS PRECISION CASE THE
7 MOTION HEARINGS.

8 THE CLERK: THE COURT CALLS THE CASE OF
9 CELLECTIS VERSUS PRECISION BIOSCIENCES, INC., CASE NUMBER
10 5:08-CV-119-H.

11 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN,
12 MY NAME IS MAGISTRATE JUDGE DAVID DANIEL. THIS IS THE
13 FIRST TIME I HAVE HAD THE PLEASURE WITH MEETING WITH SOME
14 OF YOU. THE LOCAL COUNSEL I KNOW.

15 AT THIS TIME, MR. GALE, I AM GOING TO ASK YOU
16 TO INTRODUCE WHO YOU HAVE WITH YOU ON THE BEHALF OF THE
17 PLAINTIFFS TODAY.

18 MR. GALE: THANK YOU, YOUR HONOR. I HAVE
19 RICHARD GRESALFI FROM KENYON AND KENYON.

20 MR. GRESALFI: GOOD MORNING, YOUR HONOR.

21 MR. GALE: THIS IS PAUL RICHTER.

22 MR. RICHTER: GOOD MORNING, YOUR HONOR.

23 MR. GALE: AND ANNE LI.

24 MS. LI: GOOD MORNING, YOUR HONOR.

25 THE COURT: GOOD MORNING, MS. LI.

1 MR. GALE: AND THEN DAVID GOMEZ FROM OUR
2 OFFICE WHO IS NOT A LAWYER, BUT HE IS JUST RUNNING THE
3 TECHNOLOGY.

4 THE COURT: ALL RIGHT. VERY GOOD. MR. GOMEZ,
5 YOU MAY BE THE MOST IMPORTANT PERSON HERE. SO NICE TO
6 HAVE YOU. PLEASE BE SEATED.

7 ALL RIGHT. MR. MORRIS, WHO DO YOU HAVE?

8 MR. MORRIS: GOOD MORNING, YOUR HONOR. JOEY
9 MORRIS FROM THE SMITH, ANDERSON FIRM HERE IN RALEIGH, AND
10 WE HAVE WITH US TODAY DAVID BASSETT FROM WILMERHALE IN
11 NEW YORK, VINITA FERRERA AND ALLEN NUNNALLY, ALSO FROM
12 WILMERHALE IN BOSTON.

13 THE COURT: VERY GOOD. NICE TO HAVE YOU DOWN.
14 WE TURNED UP THE HEAT FOR ALL OF OUR OUT OF TOWN GUESTS
15 TO MAKE IT AS UNPLEASANT AS WE CAN FOR YOU. BUT
16 ACTUALLY, IT'S A VERY NICE PLACE, BUT YOU HAVE CAUGHT IT
17 AT ITS VERY WORST.

18 WE ARE HERE TODAY AT MR. BASSETT OR WHO IS
19 PRESENTING ON BEHALF OF --

20 MR. MORRIS: MR. BASSETT AND MS. FERRERA WILL
21 BE PRESENTING FOR PRECISION TODAY.

22 THE COURT: MR. BASSETT AND MS. FERRERA, ON
23 YOUR MOTIONS TO COMPEL AND STAY THE PROCEEDINGS PENDING
24 THE RESOLUTION OF THE REEXAMINATION OF THE TWO PATENTS AT
25 ISSUE. AS SUCH, YOU HAD REQUESTED THIS HEARING. WE

1 LOOKED -- IT HAS BEEN SOME TIME SINCE THE MOTIONS WERE
2 FILED BASED ON THE PROCEDURAL HISTORY OF THE CASE.

3 I THOUGHT IT WOULD BE HELPFUL THAT TYPICALLY
4 WE WOULDN'T HOLD MOTION HEARINGS. I THOUGHT IT WOULD BE
5 HELPFUL TO HAVE THAT TODAY. THAT BEING SAID, IT IS YOUR
6 MOTIONS, AND TO SOME DEGREE, I AM GOING TO LET YOU GO
7 FORWARD ON THAT AND MAKE WHATEVER PRESENTATION YOU DEEM
8 APPROPRIATE, AND I HAVE GOT A FEW QUESTIONS FOR YOU AS
9 WELL AS FOR THE PLAINTIFFS AFTER THEY HAVE RESPONDED TO
10 YOUR PRESENTATION.

11 MR. BASSETT: THANK YOU, YOUR HONOR. IF IT --
12 I THINK OUR PREFERENCE WOULD BE TO FIRST ARGUE THE MOTION
13 TO STAY AND THEN THE MOTION TO COMPEL.

14 THE COURT: I CAN UNDERSTAND WHY YOU WANT TO
15 DO THAT.

16 MR. BASSETT: IF YOU DON'T WANT, IF THERE IS
17 NO NEED TO GET TO THE MOTION TO COMPEL AFTER HEARING THE
18 MOTION TO STAY, THAT WOULD BE FINE.

19 THE COURT: I FELT LIKE THAT WOULD BE YOUR
20 POSITION.

21 MR. BASSETT: YOUR HONOR, AGAIN, I AM DAVID
22 BASSETT FROM WILMERHALE HERE ON BEHALF OF THE DEFENDANT
23 PRECISION BIOSCIENCES.

24 THE MOST CRITICAL POINT TO NOTE AS WE APPEAR
25 HERE TODAY REGARDING THE MOTION TO STAY IS THAT EVERY

1 SINGLE CLAIM BEING ASSERTED BY CELLECTIS AGAINST
2 PRECISION IN THIS LITIGATION TODAY STANDS REJECTED BY THE
3 PATENT OFFICE.

4 AND IN RESPONSE TO THOSE REPEATED REJECTIONS
5 BY THE PATENT OFFICE, THE PATENTEE HAS ATTEMPTED TO MAKE
6 SUBSTANTIVE AMENDMENTS TO EACH OF THE CLAIMS CELLECTIS IS
7 ASSERTING AGAINST PRECISION IN THIS LITIGATION.

8 IN LIGHT OF THE NOW NEAR CERTAINTY THAT ALL OF
9 THE PATENT CLAIMS AT ISSUE IN THIS LITIGATION WILL EITHER
10 BE REJECTED BY THE PATENT OFFICE OR IN THE BEST CASE
11 SCENARIO FOR CELLECTIS WILL EMERGE FROM REEXAM WITH
12 SUBSTANTIVE AMENDMENTS, IT IS OUR POSITION THAT IT MAKES
13 LITTLE OR NO SENSE FOR THE PARTIES AND THIS COURT TO
14 INCUR THE COSTS AND INCONVENIENCE OF PROCEEDING WITH THIS
15 LITIGATION, OF COMPLETING FACT DISCOVERY, OF ARGUING AND
16 DECIDING CLAIM CONSTRUCTION, OF EXCHANGING THREE ROUNDS
17 OF EXPERT REPORTS, TAKING EXPERT DEPOSITIONS, BRIEFING,
18 ARGUING, AND DECIDING SUBSTANTIVE MOTIONS, DISPOSITIVE
19 MOTIONS, AND IMPANELING A JURY AND PREPARING FOR AND
20 PRESENTING A MULTI-WEEK TRIAL, ESPECIALLY WHEN ALL OF
21 THAT COST AND EFFORT THAT IS LIKELY TO BE RENDERED MOOT
22 BY THE REEXAM PROCESS THAT IS MOVING AHEAD IN THE PATENT
23 OFFICE WITH DISPATCH.

24 YOUR HONOR, THIS LITIGATION SHOULD BE STAYED.
25 BUT FIRST, PERHAPS A BRIEF BACKGROUND ON THE REEXAM

1 STATUS AS IT RELATES TO THIS MOTION.

2 AS THE COURT KNOWS, TWO PATENTS ARE AT ISSUE
3 IN THIS LITIGATION -- THE '545 PATENT AND THE '605
4 PATENT. AND THE PATENT OFFICE HAS NOW ENTERED ACTIONS
5 CLOSING PROSECUTION ON BOTH OF THOSE PATENTS, REJECTING
6 EVERY SINGLE CLAIM THAT IS AT ISSUE IN THIS LITIGATION AS
7 ANTICIPATED OR OBVIOUS IN LIGHT OF HIGHLY MATERIAL PRIOR
8 ART THAT THE PATENTEE FAILED TO DISCLOSE TO THE PATENT
9 OFFICE IN THE ORIGINAL PROSECUTIONS.

10 AND THE PATENT OFFICE HAS REJECTED EACH OF
11 THOSE CLAIMS. EVEN IN THE FACE OF PROPOSED SUBSTANTIVE
12 AMENDMENTS PROPOSED BY THE PATENTEE DESIGNED TO SALVAGE
13 THE VALIDITY OF THOSE CLAIMS. AND EVERY INDICATION FROM
14 THE PATENT OFFICE IS THAT THESE REJECTIONS WILL BE
15 MAINTAINED GOING FORWARD.

16 NOW, CELLECTIS ARGUES TO THIS COURT THAT IT
17 BELIEVES THAT THE PATENTEE SHOULD PREVAIL IN THE REEXAM
18 PROCESS. AND I AM SURE IT DOES BELIEVE THAT. BUT TO
19 DATE, YOUR HONOR, THAT BELIEF HAS ABSOLUTELY NO BASIS IN
20 ANYTHING THAT HAS HAPPENED IN THE REEXAM PROCESS IN THE
21 PATENT OFFICE WHERE EVERY SINGLE ACTION BY THE PATENT
22 OFFICE HAS, IN FACT, BEEN DIRECTLY TO THE CONTRARY.

23 FOR BOTH PATENTS, THE PATENT OFFICE GRANTED
24 PRECISION'S PETITION FOR REEXAM. EVERY SINGLE ASSERTED
25 CLAIM HAS BEEN REJECTED, NOT ONCE, BUT TWICE, AS

1 ANTICIPATED FOR OBVIOUS OTHER PRIOR ART, AND THE PATENT
2 OFFICE HAS NOW ENTERED ACTIONS CLOSING PROSECUTION ON
3 BOTH PATENTS.

4 IN RESPONSE TO THESE REPEATED OFFICE ACTIONS
5 REJECTING AS INVALID THE VERY CLAIMS THAT CELLECTIS
6 ASSERTS IN THIS LITIGATION, THE PATENTEE HAS RESORTED TO
7 SUBSTANTIVELY AMENDING THE CLAIMS IN AN EFFORT TO AVOID
8 THE PRIOR ART THE PATENT OFFICE HAS FOUND INVALIDATES
9 THOSE PATENTS, BUT EVEN THOUGH SUBSTANTIVE AMENDMENTS
10 HAVE NOT SALVAGED THE CLAIMS IN REEXAM.

11 NOW, CELLECTIS ARGUES TO THIS COURT THOSE
12 AMENDMENTS ARE NOT SUBSTANTIVE. BUT THE ARGUMENTS MADE
13 BY THE PATENTEE THEMSELVES DRAIN THE REEXAM AND PROVES
14 THE CONTRARY. AND A BIT OF DETAIL ABOUT THE REEXAMS WILL
15 ILLUSTRATE THE POINT, I BELIEVE, YOUR HONOR.

16 BOTH PATENTS AT ISSUE IN THIS CASE ARE
17 DIRECTED TO METHODS OF USING SOMETHING CALLED GROUP I
18 INTRON-ENCODED ENDONUCLEASES TO PRODUCE A DOUBLE-STRANDED
19 BREAK IN DNA AT THE PARTICULAR SITE TO ALLOW INSERTION OF
20 A GENE OF INTEREST INTO THAT DNA.

21 NOW, ON THEIR FACE, THE CLAIMS IN BOTH PATENTS
22 COVER ALL CELLS, AND YOUR HONOR, CELLS ARE GENERALLY
23 DIVIDED INTO TWO BASIC CATEGORIES: PROKARYOTES, WHICH
24 ARE SIMPLE ONE CELL, SINGLE CELLED CREATURES WITHOUT A
25 NUCLEUS. AND THEN THERE IS EUKARYOTES, WHICH ARE THE

1 MORE COMPLEX CELLULAR ORGANISMS THAT HAVE A NUCLEUS.

2 EVERY CELL IS EITHER A PROKARYOTE OR A
3 EUKARYOTE, BUT ON THEIR FACE, THE CLAIMS IN THESE PATENTS
4 COVER BOTH.

5 ALSO, ALL OF THE CLAIMS ON THEIR FACE COVER
6 ALL DNA WHETHER OR NOT IT APPEARS IN THE CHROMOSOME OF A
7 CELL OR NOT.

8 NOW, THE REEXAM OF THE '545 PATENT STARTED IN
9 JULY OF 2009 WHEN PRECISION FILED ITS INTER PARTES REEXAM
10 REQUEST. ON SEPTEMBER 17 OF LAST YEAR, ALL ASSERTED
11 CLAIMS OF THE '545 PATENT WERE REJECTED BY THE PATENT
12 OFFICE. AND THE ONLY INDEPENDENT CLAIM THAT IS ASSERTED
13 IN THIS LITIGATION, WHICH IS CLAIM 7 OF THE '545 PATENT,
14 WAS REJECTED AS ANTICIPATED BY TWO PRIOR ART REFERENCES,
15 WON CALLED QUIRK, NAMED AFTER THE PRIMARY AUTHOR, AND
16 BELL-PEDERSEN, ANOTHER PIECE OF PRIOR ART.

17 NEITHER QUIRK NOR BELL-PEDERSEN WERE DISCLOSED
18 TO THE PATENT OFFICE DURING THE ORIGINAL PROSECUTION BY
19 THE PATENTEE. AND BOTH DESCRIBE EXPERIMENTS IN
20 PROKARYOTIC CELLS AND NOT EUKARYOTIC CELLS.

21 SO ON NOVEMBER 17 OF LAST YEAR, THE PATENT
22 OWNER ATTEMPTED TO ADD A NEW CLAIM TO THE '545 PATENT.
23 IT WAS LIMITED TO EUKARYOTIC CELLS IN AN ATTEMPT TO AVOID
24 THE PRIOR ART OF QUIRK AND BELL-PEDERSEN WHICH WAS
25 LIMITED TO PROKARYOTES OR DESCRIBED AS PROKARYOTES.

1 ON FEBRUARY 18 OF THIS YEAR, THE PTO ISSUED AN
2 ACTION CLOSING PROSECUTION OF THE '545 PATENT, CONTINUING
3 TO REJECT ALL ASSERTED CLAIMS AS ANTICIPATED AND
4 REJECTING THE NEW EUKARYOTIC CLAIM AS OBVIOUS OVER THE
5 PRIOR ART.

6 ON APRIL 19 OF THIS YEAR, THE PATENT OWNER
7 FILLED ITS RESPONSE TO THE ACTION CLOSING PROSECUTION,
8 BUT IT DID SOMETHING SIGNIFICANT. THE PATENT OWNER DID
9 NOT MAKE A SUBSTANTIVE RESPONSE TO THE PATENT OFFICE
10 REJECTIONS TO THE CLAIMS. INSTEAD, IT ATTEMPTED TO AMEND
11 ALL OF THE CLAIMS FOR THE '545 PATENT TO LIMIT THEM TO
12 EUKARYOTIC CELLS.

13 AND TWO SIGNIFICANT POINTS COME FROM THAT
14 RESPONSE, YOUR HONOR. BY ATTEMPTING TO ADD THE
15 EUKARYOTIC LIMITATION TO ALL OF THE CLAIMS TO AVOID THE
16 PRIOR ART, THE PATENT OWNER NECESSARILY ADMITTED THAT
17 THAT AMENDMENT WAS SUBSTANTIVE.

18 SECONDLY, THE PATENT OFFICE HAS ALREADY
19 REJECTED CLAIMS LIMITED TO EUKARYOTES AS OBVIOUS OVER THE
20 PRIOR ART, SO IT SEEMS HIGHLY UNLIKELY THAT THESE
21 AMENDMENTS ARE GOING TO SALVAGE THESE CLAIMS, THE
22 VALIDITY OF THESE CLAIMS FOR ANY REEXAM.

23 THE REEXAM OF THE '605 PATENT FILED A SIMILAR
24 PACT OR POSITION. PRECISION FILED ITS INTER PARTES
25 REEXAM PETITION IN JULY OF 2009.

12 AND AGAIN, TO LIMIT THE CLAIMS TO EUKARYOTIC
13 CELLS, ALL DONE IN AN EFFORT TO AVOID THE PRIOR ART THAT
14 THE PATENT OFFICE FOUND IN INVALIDATING THE PATENT.
15 AGAIN, NECESSARILY PROVING THAT THOSE AMENDMENTS WERE
16 INTENDED TO AND ARE, IN FACT, SUBSTANTIVE AMENDMENTS.

17 JUST LAST WEEK, ON JUNE 7, THE PTO ISSUED AN
18 ACTION CLOSING PROSECUTION OF THE '605 PATENT AND
19 MAINTAINING ITS REJECTIONS OF ALL CLAIMS OF THE '605
20 PATENT AS INVALID.

21 SO, YOUR HONOR, THE MOST LIKELY SCENARIO NOW
22 IS THAT ALL ASSERTED CLAIMS IN THIS LITIGATION WILL BE
23 FINALLY REJECTED BY THE PATENT OFFICE AS ANTICIPATED OR
24 OBVIOUS OVER THE PRIOR ART.

25 BUT CELLECTIS RESPONDS, WAIT A MINUTE, THE

1 REJECTION BY THE PATENT OFFICE IS NOT YET FINAL, THE
2 PATENT OWNER HAS A RIGHT TO APPEAL IN THE PATENT OFFICE.
3 AND THAT IS TRUE, YOUR HONOR. BUT THE BEST CASE SCENARIO
4 FOR CELLECTIS NOW ON THE '545 PATENT IS THAT THE NARROWER
5 CLAIMS WITH THE EUKARYOTIC AMENDMENT WILL ISSUE.

6 BUT IN THAT UNLIKELY SCENARIO, ALL CURRENT
7 CLAIMS OF THE '545 PATENT, WHICH DO NOT HAVE EUKARYOTIC
8 LIMITATIONS, WILL BE CANCELED BY THE PATENT OFFICE AND
9 NEW CLAIMS, NARROWER CLAIMS, WILL ISSUE.

10 LIKEWISE, THE BEST CASE SCENARIO UNDER THE
11 '605 PATENT FOR CELLECTIS IS ESSENTIALLY THE SAME. THAT
12 IT WOULD WIN THE APPEAL ON THE AMENDED CLAIMS ADDING
13 CHROMOSOMAL AND EUKARYOTIC LIMITATIONS TO THE CLAIMS, BUT
14 IT WOULD AGAIN THEN BE ENTITLED TO NO DAMAGES ON THE
15 CURRENT CLAIMS BECAUSE THEY WOULD BE CANCELED BY THE
16 PATENT OFFICE.

17 IT THUS MAKES NO SENSE, WE BELIEVE, TO
18 CONTINUE TO LITIGATE, TO CONTINUE THIS LITIGATION
19 REGARDING THE ORIGINAL CLAIMS ASSERTED BY CELLECTIS WHICH
20 ARE MOST LIKELY TO BE REJECTED AS INVALID, AND AT THE
21 BEST CASE, WILL BE AMENDED IN A WAY THAT WOULD MOOT THE
22 RESULTS OF THIS ENTIRE LITIGATION.

23 NOW, YOUR HONOR, THE RESULTS OF THIS REEXAM
24 PROCESS ARE NOT PARTICULARLY SURPRISING GIVEN THE
25 PATENTEE'S IMPROPER ATTEMPT TO HIDE THE MOST RELEVANT

1 PRIOR ART FROM THE PATENT OFFICE. IT'S NOTED, YOUR
2 HONOR, THESE TWO PATENTS ARE DIRECTED TO METHODS OF USING
3 GROUP I INTRON-ENCODED ENDONUCLEASES TO PRODUCE A
4 DOUBLE-STRANDED BREAK IN THE DNA TO ALLOW INSERTION OF A
5 GENE OF INTEREST.

6 BUT THE INVENTION THAT WAS ORIGINALLY
7 DESCRIBED BY THE INVENTORS WAS SEVERELY LIMITED. IT
8 WOULD ONLY WORK IF THE NATURALLY OCCURRING RECOGNITION
9 SITE FOR THE GROUP I INTRON-ENCODED ENDONUCLEASES
10 HAPPENED TO BE PRESENT IN THE DNA SO THAT THAT GROUP I
11 INTRON-ENCODED ENDONUCLEASES WOULD KNOW WHERE TO CUT AND
12 THIS WAS A RARE THING IN NATURE. IT ESSENTIALLY REQUIRED
13 A TRIAL AND ERROR EFFORT TO FIND THIS RECOGNITION SITE IN
14 DNA, OR IT REQUIRED THE INSERTION OF THAT RECOGNITION
15 SITE INTO THE DNA, SEVERELY LIMITING THE PRACTICAL
16 APPLICATION OF THE CLAIMED INVENTION.

17 BUT THEN, ABOUT A DECADE LATER, THE SCIENTISTS
18 AT PRECISION DEVELOPED A REVOLUTIONARY BREAKTHROUGH THAT
19 ALLOWED SCIENTISTS TO CUT THE DNA AT VIRTUALLY ANY
20 DESIRED LOCATION, WHETHER OR NOT THE NATURAL RECOGNITION
21 SITE EXISTED IN THE DNA. THESE SO CALLED ENGINEERED
22 ENDONUCLEASES WERE MUCH MORE FLEXIBLE, PRACTICAL AND
23 USEFUL, AND PRESENTED A HUGE COMPETITIVE THREAT TO
24 CELLECTIS WITH ITS OLDER, CRUDER TRIAL AND ERROR
25 TECHNIQUE THAT RELIED ON THE PRESENCE OF THE NATURALLY

1 OCCURRING RECOGNITION SITE.

2 BECAUSE CELLECTIS COULD NOT BEAT PRECISION IN
3 THE MARKETPLACE, IT TRIED TO BEAT IT IN THE PATENT
4 OFFICE. AT ALMOST THE VERY MOMENT THAT CELLECTIS
5 EXCLUSIVELY LICENSED THE PATENTS AT ISSUE IN THIS
6 LITIGATION, THE PATENT OWNERS, FOR THE VERY FIRST TIME,
7 STARTED SEEKING FAR BROADER PATENT CLAIMS THAT WERE NO
8 LONGER LIMITED TO ENDONUCLEASES THAT RECOGNIZED ONLY
9 NATURALLY OCCURRING RECOGNITION SITES. BUT THE ONLY WAY
10 THE PATENT OWNER COULD GET THOSE BROADER CLAIMS WAS BY
11 NOT DISCLOSING THE HIGHLY RELEVANT PRIOR ART --
12 QUIRK, BELL-PEDERSON, AND THE OTHER REFERENCES THAT I
13 HAVE REFERRED TO -- EVEN THOUGH THE EVIDENCE IS CLEAR
14 PATENT OWNERS KNEW ABOUT THAT PRIOR ART.

15 NOW THAT THESE HIGHLY RELEVANT PIECES OF ART
16 HAVE BEEN BROUGHT TO THE PTO'S ATTENTION BY PRECISION IN
17 THE REEXAMS, THE RESULTS ARE ENTIRELY PREDICTABLE.

18 THE OVERLY BROAD CLAIMS OF THE '545 AND '605
19 PATENTS HAVE BEEN REJECTED AS ANTICIPATED BY THAT PRIOR
20 ART. AND THE PATENTEE COULD ONLY ATTEMPT TO SALVAGE
21 THOSE PATENTS BY NOW TRYING TO AMEND THE CLAIMS TO AVOID
22 THAT PREVIOUSLY UNDISCLOSED PRIOR ART. SO FAR, THOSE
23 EFFORTS HAVE BEEN UNSUCCESSFUL.

24 SO, IN LIGHT OF THE STATE OF AFFAIRS AND THE
25 REEXAM, AS I SAID, WE BELIEVE IT MAKES NO SENSE TO MOVE

1 FORWARD WITH THIS LITIGATION, YOUR HONOR, LIMITED TO THE
2 ORIGINAL, UNAMENDED, NOW REJECTED CLAIMS FROM THE '545
3 AND '605 PATENTS. IT MAKES NO SENSE TO INCUR THE COSTS,
4 INCONVENIENCE, AND LIKELY WASTED EFFORT OF MOVING FORWARD
5 THROUGH EXPERT DISCOVERY, CLAIM CONSTRUCTION, DISPOSITIVE
6 MOTIONS, TRIAL PREP AND TRIAL AND WHEN ALL OF THAT COST
7 AND EFFORT WILL ALMOST CERTAINLY BE MOOTED BY THE REEXAM
8 PROCESS.

9 NOW, CELLECTIS ARGUES THAT IT WOULD BE
10 IRREPARABLY HARMED BY A STAY, BUT IT IS WRONG, YOUR
11 HONOR. FIRST, CELLECTIS WOULD ALSO BENEFIT FROM THE
12 CONSERVATION OF SOURCES THAT WOULD RESULT FROM A STAY.
13 SECOND, CELLECTIS CAN ALWAYS RESUME IN ITS PURSUIT OF
14 PAST DAMAGES FOR PATENT INFRINGEMENT IN THE UNLIKELY
15 EVENT THAT ITS CLAIMS SURVIVE THE APPEAL IN THE PATENT
16 OFFICE.

17 BUT GIVEN ITS SUBSTANTIVE AMENDMENTS TO THE
18 CLAIMS, EVEN IF THE CLAIMS SURVIVE IN SOME FORM, THE
19 CURRENT CLAIMS ARE MOST LIKELY TO BE CANCELED AND
20 CELLECTIS WOULD BE ENTITLED TO NO PAST DAMAGES UNDER 35
21 U.S.C. SECTION 252, AND WOULD ONLY BE ENTITLED TO DAMAGES
22 ON THE AMENDED CLAIMS GOING FORWARD UNDER 35 U.S.C.
23 SECTION 307(B). SO THERE IS NO IRREPARABLE HARM FROM
24 THAT DELAY.

25 BUT THEN CELLECTIS ARGUES THAT IT WOULD BE

1 DENIED ITS RIGHT TO SEEK AN INJUNCTION SINCE THE CURRENT
2 CLAIMS EXPIRE IN 2012.

3 AS A THRESHOLD MATTER, YOUR HONOR, I WOULD
4 SUGGEST THIS ARGUMENT RINGS RATHER HOLLOW GIVEN THAT
5 CELLECTIS HAS NEVER SOUGHT A TRO OR A PRELIMINARY
6 INJUNCTION IN THIS LITIGATION. IT CERTAINLY STRONGLY
7 INDICATES THAT, IN FACT, CELLECTIS DOES NOT BELIEVE IT IS
8 SUFFERING FROM IRREPARABLE HARM.

9 MOREOVER, CELLECTIS IS HIGHLY UNLIKELY TO BE
10 ENTITLED TO ANY INJUNCTION ON THE CURRENT CLAIMS IN ANY
11 EVENT GIVEN THE SUBSTANTIVE AMENDMENTS THAT HAVE BEEN
12 MADE TO THOSE CLAIMS.

13 AND CELLECTIS SEEKS TO IGNORE THE SEVERE
14 PREJUDICE THAT PRECISION WOULD SUFFER IF A STAY IS NOT
15 GRANTED. YOUR HONOR, PRECISION IS A SMALL COMPANY WITH
16 ONLY ABOUT A DOZEN EMPLOYEES. AND DISCOVERY HAS REVEALED
17 THAT CELLECTIS' INTENT ALL ALONG WAS TO USE THE CRUSHING
18 COST OF LITIGATION TO HELP DEFEAT PRECISION IN THIS
19 LITIGATION.

20 AND YOUR HONOR, I WOULD SUGGEST THAT THAT
21 TACTIC SHOULD NOT BE ENDORSED BY THIS COURT. EVEN MORE
22 SEVERELY IS A PREJUDICE THAT COULD RESULT IF PRECISION IS
23 FORCED TO PAY DAMAGES OR IF IT'S ENJOINED BASED ON THE
24 CURRENT CLAIMS BEING ASSERTED BY CELLECTIS IF THE PATENT
25 IS ULTIMATELY FOUND INVALID IN THE FINAL RESULT IN THE

1 REEXAM, OR IF THOSE CLAIMS ARE LATER CANCELED DUE TO
2 SUBSTANTIVE AMENDMENTS.

3 PRECISION WOULD HAVE NO RECOURSE OR REMEDY FOR
4 THAT SEVERE AND PERHAPS FATAL HARM, YOUR HONOR. BUT, OF
5 COURSE, THIS IS PRECISELY THE RESULT THAT CELLECTIS SEEKS
6 TO ACHIEVE IN OPPOSING THIS MOTION FOR A STAY. IT CAN
7 ONLY WIN NOW BY RUSHING FORWARD TO TRIAL ON OLD PATENT
8 CLAIMS THAT HAVE BEEN REJECTED BY THE PATENT OFFICE AND
9 SUBSTANTIVELY AMENDED BY THE PATENT OWNER IN THE HOPES
10 THAT IT COULD WIN A JURY TRIAL BEFORE THE PTO PROCESS IS
11 COMPLETED. THIS SHOULD NOT BE ALLOWED, YOUR HONOR.

12 CELLECTIS THEN ARGUES THAT REEXAM WON'T
13 RESOLVE MOST OF THE ISSUES IN THIS LITIGATION. AGAIN, IT
14 IS WRONG. THE PRIMARY OVERRIDING ISSUE IN THIS
15 LITIGATION, WITHOUT A DOUBT, IS CELLECTIS' CLAIM OF
16 PATENT INFRINGEMENT BY PRECISION. THE REEXAM PROCESS
17 WILL RESOLVE OR AT A MINIMUM GIVE STRONG GUIDANCE ON
18 WHETHER THE CURRENT CLAIMS ASSERTED BY CELLECTIS ARE
19 VALID.

20 THE REEXAM PROCESS WILL ALSO DETERMINE THE
21 PROPER SCOPE OF THE CLAIMS OF THE '545 AND '605 PATENTS
22 WHICH GOES DIRECTLY TO THE QUESTION OF INFRINGEMENT. BUT
23 THE REEXAM PROCESS ALSO GOES DIRECTLY TO CELLECTIS' OTHER
24 CLAIMS AND THE OTHER CLAIMS AT ISSUE IN THIS LITIGATION.

25 FIRST, IT'S RELEVANT TO CELLECTIS' STRAINED

1 CLAIMS OF LIBEL PER SE, UNFAIR COMPETITION AND CLAIMS
2 UNDER THE LANHAM ACT, WHICH ARE ALL BASED ON THE CONTENT
3 OF SOME OF PRECISION'S PRESS RELEASES WHICH MERELY SAID
4 THAT IF THE PATENT OFFICE APPLIED THE SAME LOGIC TO THE
5 PATENTS-IN-SUIT IN THIS LITIGATION THAT IT HAD APPLIED TO
6 TWO RELATED PATENTS THAT THE PATENT OFFICE HAD REJECTED
7 AS INVALID, THAT THE PATENTS-IN-SUIT SHOULD ALSO BE
8 REJECTED AS INVALID, WHICH IS EXACTLY WHAT HAPPENED IN
9 THE REEXAMS OF THE PATENTS-IN-SUIT.

10 SO, YOUR HONOR, THERE WAS NO LIBEL. THERE WAS
11 JUST A PREDICTION LABELED AS SUCH IN THE PRESS RELEASE
12 THAT TURNED OUT TO BE TRUE. THE REEXAM WILL ALSO GO TO
13 PRECISION'S DEFENSE OF INEQUITABLE CONDUCT. THE PATENT
14 OFFICE'S REJECTION OF THE '545 AND '605 PATENT BASED ON
15 PREVIOUSLY UNDISCLOSED PRIOR ART ESTABLISHES THE CLEAR
16 MATERIALITY OF THAT PRIOR ART.

17 DISCOVERY HAS ESTABLISHED THAT THE PATENTEEES
18 WERE AWARE OF THAT HIGHLY MATERIAL PRIOR ART, BUT FAILED
19 TO DISCLOSE IT TO THE PATENT OFFICE. THERE IS NO DISPUTE
20 THAT THOSE PRIOR ART REFERENCES WERE NOT DISCLOSED BY THE
21 PATENTEEES.

22 HIGHLY MATERIAL PRIOR ART, PLUS HIGH
23 MATERIALITY, PLUS A FAILURE TO DISCLOSE TO THE PATENT
24 OFFICE CAN EQUAL A PRESUMPTION OF AN INTENT TO DECEIVE
25 THE PATENT OFFICE, ALL OF WHICH ADDS UP TO INEQUITABLE

1 CONDUCT. SO THE REEXAM PROCESS IS, IN FACT, HIGHLY
2 RELEVANT TO THE INEQUITABLE CONDUCT OFFENSE.

3 BUT, YOUR HONOR, EVEN IF THE REEXAM PROCESS
4 DOES NOT RESOLVE ALL OF THE ISSUES IN THIS LITIGATION,
5 THERE IS LITTLE DOUBT THAT THE PROCESS WILL CERTAINLY
6 SIMPLIFY THE ISSUES IN THIS LITIGATION. AT A BARE
7 MINIMUM, THE COURT AND THE JURY WOULD BENEFIT FROM THE
8 PATENT OFFICE'S VIEWS ON THE PRIOR ART THAT WAS
9 PREVIOUSLY UNCONSIDERED BY THE PATENT OFFICE AND WHICH IS
10 HIGHLY TECHNICAL IN NATURE.

11 FINALLY, YOUR HONOR, CELLECTIS ARGUES THAT THE
12 MOTION FOR A STAY SHOULD BE DENIED BECAUSE PRECISION
13 WAITED TOO LONG TO FILE ITS REQUEST FOR A REEXAM AND ITS
14 MOTION FOR A STAY.

15 AS A THRESHOLD MATTER, YOUR HONOR, IT IS WORTH
16 NOTING THAT CONTRARY TO CELLECTIS' FALSE SUGGESTION THAT
17 THIS CASE IS ALMOST READY FOR TRIAL, THERE IS STILL MUCH
18 TO DO IN THIS LITIGATION. A LOT OF FACT DISCOVERY HAS
19 OCCURRED IN THIS CASE, FOR SURE, BUT WELL OVER HALF OF
20 THIS CASE REMAINS TO BE COMPLETED, SO A STAY WILL STILL
21 SERVE THE ENDS OF JUDICIAL EFFICIENCY.

22 AS I HAVE NOTED BEFORE, WE STILL HAVE TO
23 COMPLETE FACT DISCOVERY, EXPERT DISCOVERY INCLUDING
24 EXCHANGES OF REPORTS AND DEPOSITIONS, DISPOSITIVE
25 MOTIONS, CLAIM CONSTRUCTION, RULINGS AND ARGUMENTS, AND

1 THEN, OF COURSE, PREPARING FOR A JURY TRIAL AND
2 IMPANELING A JURY, AND ALL THAT THAT ENTAILS.

3 AS THE COURT IN THE EASTERN DISTRICT OF
4 MICHIGAN OBSERVED IN THE 2009 INSITUFORM CASE WHICH WE
5 CITED IN OUR BRIEFS, (QUOTE) "THE DISCOVERY COSTS
6 INCURRED TO DATE WILL NOT BE RECOUPED BY DENYING A STAY
7 AND PROCEEDING TO TRIAL, NOR WILL THE COMPLETED DISCOVERY
8 PROVE USELESS IF THE PATENTS ARE HELD VALID AND THE STAY
9 LIFTED." (CLOSED QUOTE).

10 BUT CELLECTIS STILL ARGUES THE MOTION FOR STAY
11 SHOULD BE DENIED PRIMARILY BECAUSE THE REEXAM REQUEST WAS
12 NOT FILED UNTIL JULY 2009 AND SUGGESTS THAT THAT TIMING
13 WAS PART OF SOME NEFARIOUS PLOT BY PRECISION. THAT IS
14 SIMPLY NOT TRUE.

15 THE SIMPLE FACT IS THAT PRECISION WAITED TO
16 REQUEST THE REEXAM BECAUSE IT ORIGINALLY THOUGHT THAT
17 THIS LITIGATION WOULD PROVIDE FASTER MEANS FOR RESOLUTION
18 OF THIS BASELESS SUIT. PRECISION DID NOT WANT THE PALL
19 OF THIS LAWSUIT HANGING OVER IT ANY LONGER THAN
20 NECESSARY. THEN, THE PTO QUICKLY REJECTED CLAIMS OF
21 OTHER RELATED PATENTS IN REEXAM.

22 SO PRECISION SOUGHT REEXAM ON THE
23 PATENTS-IN-SUIT AS WELL TO SEE IF A SPEEDIER RESOLUTION
24 COULD BE REACHED IN THE PATENT OFFICE, AND INDEED, THE
25 REJECTIONS AND ACTIONS CLOSING PROSECUTION CAME MUCH

1 FASTER THAN WE EXPECTED, BRINGING US TO WHERE WE ARE
2 TODAY.

3 IF CELLECTIS IS SO CONCERNED ABOUT THE TIMING
4 AND DELAY, WHY DIDN'T IT FILE ITS COMPLAINT FOR PATENT
5 INFRINGEMENT SOONER? WHY HAS IT ENGAGED IN EXTENSIVE
6 DELAYS IN PROVIDING ADEQUATE DISCOVERY IN THIS CASE WHICH
7 HAS NECESSITATED THE EXTENSION OF THE SCHEDULING IN THIS
8 CASE. AND WHY HAVE THE PATENT OWNERS SOUGHT REPEATED
9 EXTENSIONS IN THE REEXAM PROCESS?

10 THE FACT IS, YOUR HONOR, THAT IF WE BROUGHT
11 THIS MOTION TO STAY IMMEDIATELY AFTER THE GRANTING OF THE
12 REEXAM, CELLECTIS WOULD HAVE ARGUED THAT MOTION WAS
13 PREMATURE. INSTEAD, PRECISION DID THE CONSERVATIVE,
14 RESPONSIBLE THING. WE WAITED FOR THE SUBSTANTIVE
15 REJECTIONS FROM THE PATENT OFFICE. NOW WE HAVE ACTIONS
16 CLOSING PROSECUTION ON BOTH PATENTS. THAT IS WHEN WE
17 FILED THE MOTION.

18 THERE CAN NOW BE NO DOUBT THE CONTINUING TO
19 LITIGATE PATENT CLAIMS IN THE CURRENT FORM WILL BE A
20 WASTE OF TIME, OF MONEY, AND JUDICIAL RESOURCES.

21 YOUR HONOR, IN CONCLUSION, IF A MOTION FOR
22 STAY IS GRANTED, THE NEED FOR ANY TRIAL IN THIS CASE IS
23 MOST LIKELY TO BE OBLIVIATED COMPLETELY. BUT EVEN IF A
24 TRIAL NEEDS TO GO FORWARD AFTER A STAY, THE COURT WILL
25 THEN HAVE THE BENEFIT OF A PATENT OFFICE'S EXPERIENCED

1 VIEW ON HIGHLY TECHNICAL PATENTS THAT HAVE NOT PREVIOUSLY
2 BEEN CONSIDERED BY THE PATENT OFFICE. THE CLAIM LANGUAGE
3 WILL FINALLY BE SET IN STONE AND NOT BE A MOVING TARGET.

4 AND FOR ALL OF THESE REASONS, THIS LITIGATION
5 SHOULD BE STAYED UNTIL AFTER THE COMPLETION OF THE
6 REEXAMS AND THE PATENTS AND THE PATENTS-IN-SUIT.

7 THANK YOU.

8 THE COURT: MR. BASSETT, LET ME ASK YOU A FEW
9 QUESTIONS AND WE'LL LET YOUR COLLEAGUES HAVE THEIR CHANCE
10 AT THE PODIUM.

11 MR. BASSETT: SURE.

12 THE COURT: WHAT DISCOVERY NEEDS TO -- YOU
13 CONTEND THE CASE IS ONLY HALF OVER AND THAT THERE IS
14 SIGNIFICANT DISCOVERY.

15 WHAT DISCOVERY WOULD YOU ANTICIPATE YOU WOULD
16 NEED? AND DIDN'T DISCOVERY END LIKE TEN MONTHS AGO?

17 MR. BASSETT: WELL, UNDER -- YES, YOUR HONOR.

18 THE COURT: THE SCHEDULING ORDER IS CURRENTLY
19 EXISTING.

20 MR. BASSETT: BUT FOR WHAT IS RELATED TO THE
21 MOTIONS TO COMPEL, YOU ARE RIGHT, YOUR HONOR. THE FACT
22 DISCOVERY PORTION OF THIS CASE IS NEARLY OR ALMOST AT AN
23 END. BUT THAT THEN LEADS TO THE EXPERT DISCOVERY WHICH
24 INVOLVES THREE ROUNDS OF EXPERT REPORTS.

25 THE COURT STILL HASN'T RULED ON THE MOTION ON

1 CLAIM CONSTRUCTION WHICH WILL PERHAPS NEED TO BE ARGUED
2 AND DECIDED. ONCE THAT HAPPENS, THERE WILL BE
3 SUBSTANTIVE MOTIONS, INCLUDING POTENTIALLY DISPOSITIVE
4 MOTIONS, PERHAPS OTHER RELATED DISCOVERY MOTIONS.

5 THE COURT: SO THE SCHEDULING ORDER REALLY
6 DOESN'T MEAN MUCH IS WHAT YOU ARE --

7 MR. BASSETT: NO, YOUR HONOR. OBVIOUSLY, IT
8 MEANS A LOT.

9 THE COURT: I AM NOT TRYING TO BAIT YOU IN
10 THAT.

11 MR. BASSETT: IT MEANS A LOT, YOUR HONOR. THE
12 ORDER THE --

13 THE COURT: I WAS HOPING I GOT THAT ANSWER.
14 YOU HAD THE CORRECT ANSWER.

15 MR. BASSETT: THE MOTIONS TO COMPEL, YOUR
16 HONOR, HAVE BEEN PENDING, AND WE FILED THEM NEAR THE END
17 OF THE FACT DISCOVERY, SO THAT IS THE PIECE THAT WE ARE
18 IN.

19 THE COURT: OKAY. LET ME ASK YOU, YOU SAID
20 THAT THE '454 PATENT, THERE WAS A JUNE 7 ORDER -- I AM
21 SORRY -- REJECTING '605, THE JUNE 7 ORDER THAT JUST CAME
22 DOWN.

23 MR. BASSETT: IT WAS THE ACTION CLOSING
24 PROSECUTION OF THE '605 PATENT.

25 THE COURT: '605; OKAY.

1 MR. BASSETT: THAT'S RIGHT.

2 THE COURT: SO CELECTIS' REMEDY ON THAT IS TO
3 APPEAL THAT.

4 MR. BASSETT: WELL, NO, YOUR HONOR. ONCE YOU
5 GET THE ACTION CLOSING PROSECUTION, THEY HAVE A CHANCE TO
6 RESPOND TO THAT ACTION CLOSING PROSECUTION WHICH IS WHAT
7 THEY DID IN THE '545 PATENT.

8 THE COURT: OKAY.

9 MR. BASSETT: AND AS YOU WILL RECALL, WHAT
10 THEY DID IN THAT RESPONSE WAS TRY TO AMEND ALL THE
11 CLAIMS.

12 THE COURT: OKAY.

13 MR. BASSETT: SO THEY WOULD HAVE ONE MORE
14 CHANCE TO RESPOND BEFORE THEY WOULD HAVE TO APPEAL.

15 THE COURT: I THINK THAT IS LEADING ME AND ALL
16 THAT HAPPENED LAST SEPTEMBER WITH REGARD TO THE --

17 MR. BASSETT: '545.

18 THE COURT: '545.

19 MR. BASSETT: THAT'S RIGHT.

20 THE COURT: AND THERE STILL HAS BEEN NO
21 RULING. I AM TRYING TO SEE WHAT THE PTO, WHAT KIND OF
22 TIME FRAME YOU WOULD ANTICIPATE, UNDERSTANDING THAT YOU
23 ARE NOT A FORTUNE TELLER.

24 MR. BASSETT: RIGHT. RIGHT. YOUR HONOR, THE
25 '545 PATENT, THE RESPONSE TO THE ACTION CLOSING

1 PROSECUTION WAS FILED -- LET ME MAKE SURE I GET THAT DATE
2 CORRECT -- ON APRIL 19, WHICH IS ABOUT A MONTH AGO, YOUR
3 HONOR. I WOULD EXPECT THAT THE PATENT OFFICE WILL
4 RESPOND IN LESS THAN TWO MORE MONTHS TO THAT.

5 THE COURT: SO HOW LONG DO YOU THINK IT WOULD
6 TAKE, YOUR BEST GUESS, FOR THE PTO TO ULTIMATELY RESOLVE
7 THESE MATTERS.

8 MR. BASSETT: JUST A MOMENT, YOUR HONOR. I AM
9 CONSULTING WITH FOLKS THAT KNOW MORE ABOUT THIS.

10 THE COURT: I UNDERSTAND. IT'S A SHOT IN THE
11 DARK. I UNDERSTAND.

12 MR. BASSETT: YOUR HONOR, WE AGREE. I THINK
13 THAT OUR SENSE IS THE FINAL RESOLUTION WITH THE PATENT
14 OFFICE WOULD PROBABLY BE IN FOUR MONTHS OR LESS, BUT THEN
15 SUBJECT TO THE RIGHT OF APPEAL, WHICH THERE IS NO CONTROL
16 OR ABILITY TO PREDICT THE TIME FRAME ON THAT, BUT THAT
17 COULD BE OBVIOUSLY A MATTER OF ANOTHER PERIOD OF TIME OF
18 SIX MONTHS TO A YEAR, I WOULD SAY.

19 THE COURT: OKAY.

20 MR. BASSETT: BECAUSE THEY CAN APPEAL
21 INTERNALLY IN THE PATENT OFFICE AND THEN THERE IS A
22 POTENTIAL APPEAL TO A COURT, AND YOU KNOW.

23 THE COURT: SO IT'S A LENGTHY PERIOD.

24 MR. BASSETT: WELL, I MEAN, YES, BUT IT'S ALSO
25 SOMETHING LESS THAN YEARS, I WOULD SAY, YOUR HONOR.

1 THE COURT: OKAY. ALL RIGHT. SO YOU THOUGHT
2 THAT WHEN YOU FILED THE CASE YOUR ARGUMENT WITH REGARD TO
3 THE LATE FILING OF THE REEXAMINATION REQUEST AS WELL AS
4 THESE OTHER, YOU THOUGHT THAT THIS LITIGATION WOULD
5 PROCEED MORE QUICKLY THAN THE PTO REEXAMINATION PROCESS?

6 MR. BASSETT: THAT WAS OUR ORIGINAL THOUGHT,
7
8 YOUR HONOR. AND PART OF IT WAS, OF COURSE, AS YOU WILL
9 PERHAPS RECALL, WE FILED A MOTION TO DISMISS THE CASE
10 BASED ON THE FAILURE TO JOIN THE PATENT OWNER TO THIS
11 LITIGATION WHICH WE WERE ERRONEOUSLY FAIRLY CONFIDENT
12 ABOUT, SO WE THOUGHT THERE WOULD BE A WAY TO GET THIS
13 CASE RESOLVED RELATIVELY QUICKLY, BUT THEN OBSERVED THAT
14 THE PATENT OFFICE PROCESS WAS MOVING MUCH MORE QUICKLY
15 THAN ANTICIPATED WHICH LEAD TO THE RECALCULATION ON OUR
16 PART ABOUT WHAT IS THE QUICKEST WAY TO GET THIS THING
RESOLVED.

17 THE COURT: NOW, IN LIGHT OF WHERE WE ARE,
18 TELL ME IF I WERE TO SCHEDULE A MARKMAN HEARING
19 RELATIVELY SOON, TELL ME HOW FUTILE THAT WOULD BE IN
20 LIGHT OF WHERE WE STAND WITH THE PTO TODAY WITH THE
21 REEXAMINATION.

22 MR. BASSETT: YOUR HONOR, I THINK IT WOULD BE
23 A WASTE OF EFFORT. THE ORIGINAL CLAIMS, AS I SAID, ARE
24 BROADER THAN THE CLAIMS THAT ARE NOW PENDING IN THE
25 PATENT OFFICE. TO MAKE CLEAR, WHEN I TALKED ABOUT THE

1 APPEAL PROCESS ON THESE REEXAM PETITIONS, THE APPEALS
2 WOULD BE OF THE AMENDED CLAIMS ONLY.

3 SO IF THEY APPEAL, THERE IS NO CHANCE THAT
4 WHAT IS GOING TO EMERGE FROM THE PATENT OFFICE ARE THE
5 PATENT CLAIMS THAT ARE INDEED ASSERTED IN THIS
6 LITIGATION.

7 NOW, CERTAINLY WHAT CELLECTIS IS GOING TO TRY
8 TO DO IS ARGUE IN THAT CLAIM CONSTRUCTION PROCESS TO TRY
9 TO GET THEIR CLAIM CONSTRUCTION TO COME OUT TO BE THE
10 SAME AS THE AMENDED CLAIMS IN THE PATENT OFFICE. SO THAT
11 THEY CAN SAY, WELL, SEE, THEY ARE ALL THE SAME. THIS
12 REALLY ISN'T A BIG CHANGE.

13 BUT, YOUR HONOR, THAT IS FAR FROM CERTAIN THAT
14 THAT IS THE CORRECT CONSTRUCTION. IN FACT, WE STRONGLY
15 DISAGREE THAT THAT IS THE CORRECT CONSTRUCTION. THE ONLY
16 THING THAT IS MOTIVATING CELLECTIS, IN OUR VIEW, TO ARGUE
17 FOR THESE NARROWER CLAIM CONSTRUCTIONS IS TO TRY TO AVOID
18 PRIOR ART THAT CLEARLY INVALIDATES THEIR PATENT.

19 THE COURT: OKAY. ALL RIGHT, MR.
20 BASSETT. THANK YOU.

21 MR. BASSETT: THANK YOU.

22 THE COURT: ALL RIGHT.

23 MR. BASSETT: WOULD YOU LIKE TO HEAR ARGUMENT
24 NOW ON THE MOTION TO COMPEL?

25 THE COURT: I WANT TO LET THE PLAINTIFF

1 RESPOND. I FEEL LIKE THEY HAVE TAKEN A LOT OF BODY BLOWS
2 HERE AND PROBABLY NEED TO RESPOND AND VENT, SO MR.
3 RICHTER.

4 MR. RICHTER: THANK YOU, YOUR HONOR. WE HAVE
5 A POWERPOINT PRESENTATION TO SORT OF GUIDE OUR ARGUMENT.

6 BEFORE I GET TO THE SLIDES, YOUR HONOR, I
7 THOUGHT I WOULD SPEND A COUPLE OF MINUTES TALKING ABOUT
8 THE TECHNOLOGY. MR. BASSETT DESCRIBED IT -- AND I KNOW
9 IT'S VERY COMPLEX BY NECESSITY BECAUSE IT IS A VERY
10 EXCITING AND CUTTING EDGE AREA OF SCIENCE.

11 I COMPLETELY DISAGREE WITH MR. BASSETT'S
12 DESCRIPTION THAT PRECISION WERE THE PIONEERS HERE. IN
13 FACT, THIS TECHNOLOGY WAS DEVELOPED AT THE INSTITUT
14 PASTEUR IN THE 90'S. ONE OF THE PASTEUR SCIENTISTS, DR.
15 ANDRE CHOULIKA, LEFT PASTEUR AND STARTED CELLECTIS AND
16 BASED HIS ENTIRE COMPANY ON THE PATENT SUBJECT MATTER
17 THAT HE DEVELOPED WHILE AT PASTEUR, WHICH IS WHY HE TOOK
18 THE LICENSE FROM PASTEUR. AND HE IS REALLY THE CREATOR
19 OF THE CONCEPT OF USING THESE GROUP I INTRON-ENCODED
20 ENDONUCLEASES ALONG WITH OTHER INVENTORS AS A GENETIC
21 ENGINEERING TOOL.

22 AND THE WAY THEY WORK IS THAT THEY OCCUR
23 NATURALLY, IN NATURE, IN YEAST, FOR EXAMPLE, AND THEY ARE
24 VERY EXCITING ENZYMES BECAUSE UNLIKE RESTRICTION ENZYMES,
25 WHICH YOU MAY HAVE HEARD OF, WHICH RECOGNIZES A VERY

1 SMALL NUMBER OF BASE PAIRS IN CELLS THAT IT'S INTENDED TO
2 OPERATE ON, THESE GROUP I INTRON-ENCODED ENDONUCLEASES
3 RECOGNIZE VERY LARGE, YOU KNOW, APPROXIMATELY 20 BASE
4 PAIR SEQUENCES, WHICH DON'T OCCUR THAT OFTEN.

5 SO WHEN YOU USE THEM AS A GENETIC ENGINEERING
6 TOOL, YOU CAN VERY SITE SPECIFICALLY CLEAVE A SPECIFIC
7 INTENDED AREA IN A GENE, FOR EXAMPLE, THAT YOU KNOW YOU
8 WANT TO ALTER BY PUTTING A DIFFERENT FOREIGN DNA IN THERE
9 TO ADVANTAGEOUSLY CHANGE THE BIOLOGY OF THAT CELL.

10 CELLECTIS ALSO DEVELOPED THE TECHNIQUES OF
11 ALTERING THE NATURALLY OCCURRING GROUP I INTRON-ENCODED
12 ENDONUCLEASES SO THAT THEY WOULD RECOGNIZE NATURALLY
13 OCCURRING SITES IN CELLS, AND THIS HAS A VERY PROFOUND
14 EFFECT IN A LOT OF AREAS OF SCIENCE.

15 FOR EXAMPLE, YOU CAN ALTER A CORN CELL TO
16 ADVANTAGEOUSLY RESIST A PESTICIDE. AND CELLECTIS, THAT
17 IS THEIR AREA OF TECHNOLOGY. AND WE BELIEVE THAT
18 DISCOVERY HAS SHOWN THAT, IN FACT, PRECISION IS NOT THE
19 LEADER IN THIS. IF FACT, THEY COPIED CELLECTIS'
20 TECHNOLOGY AND THEY WILLFULLY INFRINGED THESE PATENTS,
21 AND THAT IS WHY WE ARE HERE TODAY.

22 AND I WOULD LIKE TO START OUR PRESENTATION
23 WITH THE POINT THAT MR. BASSETT FOCUSED ON AT THE
24 BEGINNING OF HIS, WHICH IS A LITTLE OUT OF ORDER OF THE
25 WAY WE PLANNED IT, BUT I THINK IT'S VERY IMPORTANT

1 BECAUSE IT GOES TO THE PREJUDICE THAT CELLECTIS WOULD
2 SUFFER IF A STAY WAS IMPOSED AT THIS POINT ALONG WITH
3 WHAT ACTUALLY IS OCCURRING IN THE PATENT OFFICE WHICH
4 I THINK IS DIFFERENT THAN WHAT MR. BASSETT PRESENTED.

5 AND IF YOU LOOK AT SLIDE 12, YOUR HONOR, THIS
6 IS THE AMENDMENT THAT MR. BASSETT MENTIONED IN THE '545
7 PATENT TO CLAIM 7. THE METHOD WAS AMENDED FROM ALL CELLS
8 TO EUKARYOTIC CELLS WHICH ESSENTIALLY EXCLUDES BACTERIA
9 OR SINGLE CELLS, BUT IT WOULD INCLUDE YEAST AND MAMMALIAN
10 CELLS. AND IT WOULD EXCLUDE THE PROKARYOTES, WHICH ARE
11 BACTERIA AND OTHER SINGLE CELLS.

12 SO THAT CLAIM 7 WAS AMENDED JUST AS MR.
13 BASSETT SAID, BUT WHAT HE FAILED TO POINT OUT IS THAT
14 SOME OF THE ASSERTED CLAIMS ARE DEPENDENT FROM CLAIM 7,
15 AND THOSE INCLUDE ON THE NEXT SLIDE, SLIDE 13, CLAIMS 10
16 AND 12, CLAIM 10 RECITES "THE METHOD OF CLAIM 7, WHEREIN
17 SAID ORGANISM IS YEAST". AND CLAIM 12 RECITES, "THE
18 METHOD OF CLAIM 7, WHEREIN SAID ORGANISM IS A MAMMAL."

19 NOW, YEAST AND MAMMALS, BY DEFINITION, ARE
20 EUKARYOTES. SO WHEN YOU AMEND CLAIM 7, IF THE
21 INDEPENDENT CLAIM IS TO RECITE ONLY EUKARYOTES, YOU
22 HAVEN'T DONE ANYTHING TO CLAIMS 10 AND 12. THOSE ARE
23 ORIGINAL CLAIMS.

24 IF YOU CAN PICTURE IT AS A VENN DIAGRAM, SO
25 THE ORIGINAL VENN DIAGRAM PRIOR TO THE AMENDMENT OF CLAIM

1 7, IS A BIG CIRCLE, AND THEN THERE IS A TINY CIRCLE
2 INSIDE THAT THAT RECITES ONLY MAMMALIAN CELLS.

3 THE AMENDMENT TO EUKARYOTIC CELLS IN THE '545
4 PATENT SHRINKS THE BIG CIRCLE A LITTLE BIT BECAUSE NOW
5 THE BIG CIRCLE DOESN'T INCLUDE BACTERIA, BUT THE LITTLE
6 CIRCLE TO MAMMALS AND THE OTHER LITTLE CIRCLES TO YEAST,
7 THOSE DIDN'T CHANGE AT ALL BECAUSE THEY WERE ALWAYS
8 EUKARYOTES.

9 SO THOSE WERE ORIGINAL CLAIMS. WE ARE
10 ENTITLED TO PAST DAMAGES ON THOSE CLAIMS. WE ARE
11 ENTITLED TO AN INJUNCTION ON THOSE CLAIMS. AND WE WOULD
12 BE STRIPPED OF ALL OF THAT IF THE CASE WOULD BE STAYED
13 RIGHT NOW PREMATURELY.

14 AND THIS IS SIGNIFICANT, YOUR HONOR, BECAUSE
15 IF YOU GO PLEASE TO SLIDE 17, MORE THAN JUST AN ACADEMIC
16 EXERCISE, DISCOVERY HAS REVEALED, IN FACT, THAT THERE IS
17 AN ENTIRE PROJECT AT PRECISION, PROJECT X, WHICH IS BASED
18 ON INFRINGING THAT UNAMENDED CLAIM TO MAMMALIAN CELLS.
19 AND WE HAVE TESTIMONY THAT WE TOOK FROM A PRECISION
20 SCIENTIST ON THAT POINT WHERE, IN OUR VIEW, HE MATCHED UP
21 AN EXPERIMENT IN HIS LABORATORY NOTEBOOK WITH HIS
22 TESTIMONY TO CLAIM 7 OF THE '545 PATENT.

23 AND IF YOU LOOK AT THEIR BUSINESS PLAN, THEY
24 INDICATE QUITE CLEARLY AT THE SECOND BULLET POINT THAT
25 THEY ARE ENGAGED IN EXPERIMENTS WITH BACTERIA, YEAST,

1 MAMMALIAN CELL LINES, PLANTS AND AGAINST VIRUSES.

2 SO THERE IS NO QUESTION THAT WE HAVE CLAIMS
3 THAT CAN EMERGE FROM THE PATENT OFFICE REEXAMINATION IN
4 UNAMENDED FORM WHICH WOULD ENTITLE US TO BOTH PAST
5 DAMAGES AND AN INJUNCTION.

6 THE SAME IS TRUE WITH RESPECT TO THE '605
7 PATENT, YOUR HONOR, AND IF YOU COULD PLEASE GO TO SLIDE
8 14. NOW, I THINK AT THE END OF MR. BASSETT'S
9 PRESENTATION YOU ASKED HIM, YOUR HONOR, WHETHER A MARKMAN
10 HEARING WOULD BE FUTILE AT THIS POINT.

11 I TAKE THE COMPLETELY OPPOSITE POSITION. IT
12 IS FAR FROM FUTILE. IN FACT, IT IS NECESSARY TO
13 DETERMINE THE SCOPE OF THE ORIGINAL CLAIMS BECAUSE THERE
14 IS A BIG DISPUTE OVER THAT. UNLESS THE CLAIMS, ANY -- A
15 MERE AMENDMENT TO THE CLAIMS IN REEXAM DOES NOT
16 CONSTITUTE A SUBSTANTIAL CHANGE TO THE CLAIMS SUCH THAT
17 YOU WOULD NOT BE ENTITLED TO PAST DAMAGES OR AN
18 INJUNCTION.

19 IN OUR VIEW, THE '545 PATENT, THERE IS NO
20 QUESTION. I THINK WE HAVE JUST DEMONSTRATED THAT THEY
21 ARE JUST WRONG ON THE FACTS IN THEIR SUPPLEMENTAL BRIEF
22 OF LAST WEEK. WE CAN'T HAVE ORIGINAL CLAIMS. WE ARE
23 ENTITLED TO AN INJUNCTION. WE ARE ENTITLED TO PAST
24 DAMAGES. IN FACT, WE BELIEVE THAT WE HAVE PROVED THAT
25 THEY HAVE INFRINGED THAT ORIGINAL CLAIM.

1 IN THE '605 PATENT, THE QUESTION IS A LITTLE
2 MORE SUBTLE BECAUSE THE WORD "CHROMOSOMAL" DOES NOT
3 EXPRESSLY APPEAR IN THE ORIGINAL CLAIMS. HOWEVER, WE
4 HAVE A WORLD RECOGNIZED EXPERT, DR. BARRY STODDARD, WHO
5 AGREES WITH OUR CLAIM CONSTRUCTION THAT WHEN YOU READ THE
6 CLAIM IN THE '605 PATENT, CHROMOSOMAL IS INHERENT IN THAT
7 CLAIM, AND THAT INSERTION OF THE WORD "CHROMOSOMAL" DOES
8 NOTHING TO ALTER THE SCOPE OF THE CLAIM. IT IS NOT A
9 SUBSTANTIAL AMENDMENT BECAUSE THE ENTIRE PATENT IS
10 DIRECTED TO CREATING TRANSGENIC ORGANISMS.

11 THAT DOESN'T WORK UNLESS YOU ARE ALTERING THE
12 CHROMOSOMAL DNA BECAUSE YOU NEED THE PROGENY OF THOSE
13 ALTERED CELLS TO PROLIFERATE AND CREATE THE TRANSGENIC
14 CORN, FOR EXAMPLE, THAT YOU ARE TRYING TO PRODUCE.

15 SO THE CLAIM DOESN'T MAKE SENSE IF IT JUST
16 READS ANY DNA. IT SAYS IN THE DNA ITSELF. "CHROMOSOMAL"
17 WAS INSERTED CLEARLY FROM THE SLIDE 14, BUT IT WAS SIMPLY
18 TO MAKE EXPRESSED WHAT WAS ALREADY INHERENT.

19 AND SO WE DON'T AGREE THAT THE CLAIMS OF THE
20 '605 PATENT HAVE BEEN SUBSTANTIALLY AMENDED. WE BELIEVE
21 THAT WE ARE ENTITLED TO PAST DAMAGES AND AN INJUNCTION ON
22 THE '605 PATENT.

23 BUT MORE IMPORTANTLY, IN TERMS OF THE MARKMAN
24 HEARING, YOUR HONOR, THE COURT IS THE ONLY ENTITY THAT
25 CAN DECIDE THAT. THE COURT DOES NOT HAVE TO ACCEPT ANY

1 CLAIM CONSTRUCTION THAT THE PATENT OFFICE DETERMINES, AND
2 THE PATENT OFFICE CAN'T DETERMINE WHETHER THE CLAIMS HAVE
3 BEEN SUBSTANTIALLY AMENDED. THAT IS AN ISSUE FOR THE
4 COURT, AND THAT IS DEAD ON IN THE MARKMAN HEARING.

5 WE BELIEVE IF THERE WAS A MARKMAN HEARING, WE
6 WOULD BE PROVED RIGHT WITH RESPECT TO THE '605 PATENT AND
7 THAT WE WOULD STILL BE ENTITLED TO AN INJUNCTION AND PAST
8 DAMAGES ON THAT PATENT.

9 IF YOU CAN TURN PLEASE TO SLIDE 16. THE
10 SECOND BULLET POINT -- THIS IS A SLIDE WITH REGARD TO
11 FEDERAL CIRCUIT LAW ON THIS VERY ISSUE OF SUBSTANTIIVELY
12 AMENDED CLAIMS. THE FIRST BULLET POINT IS FROM A KAUFMAN
13 CASE, AND IT READS (QUOTE) "AMENDMENTS THAT DO NOT
14 EXPAND, NARROW, OR OTHERWISE ALTER THE MEANING OR SCOPE
15 OF THE CLAIMS ARE SUBSTANTIALLY IDENTICAL TO THE ORIGINAL
16 CLAIMS UNDER SECTION 252."

17 AND SECTION 252 IS THE SECTION OF THE PATENT
18 STATUTE THAT INDICATES THAT IF YOU DO SUBSTANTIALLY
19 AMEND, YOU MAY NOT BE ENTITLED TO PAST DAMAGES OR AN
20 INJUNCTION.

21 BUT CLEARLY THE FEDERAL CIRCUIT HAS FOUND THAT
22 ANY AMENDMENT DOESN'T CONSTITUTE SUBSTANTIAL AMENDMENT.
23 YOU HAVE TO LOOK AT IT.

24 AND THE NEXT BULLET POINT, THE TENNANT CASE,
25 IS DIRECTLY ANALOGOUS TO THE AMENDMENTS IN THE '605

1 PATENT BECAUSE THERE THE PATENT TECHNOLOGY WAS A SWEEPING
2 MACHINE WHICH WAS CITED IN THE ORIGINAL CLAIM THAT
3 RECITED A FIRST WALL AND A SECOND BOTTOM WALL. AND SO
4 THEY AMENDED THE CLAIM TO RECITE A FIRST BOTTOM WALL
5 EXPRESSLY.

6 AND WHAT THE COURT AND FEDERAL CIRCUIT FOUND
7 THERE WAS THAT INSERTING THE WORD "BOTTOM" AFTER "FIRST"
8 WAS NOT A SUBSTANTIAL AMENDMENT BECAUSE IT WAS INHERENT
9 IN THE ORIGINAL CLAIM. IF YOU HAVE A FIRST WALL AND A
10 SECOND WALL, SECOND BOTTOM WALL, THEN THE FIRST WALL MUST
11 HAVE BEEN A BOTTOM WALL AS WELL.

12 WE MAKE THE SAME ARGUMENT WITH REGARD TO THE
13 '605 PATENT. IF YOU ARE ALTERING THE DNA, IN THE DNA, IF
14 YOU ARE CLEAVING IN THE DNA, WHEN YOU LOOK AT THE ENTIRE
15 SPECIFICATION OF OUR PATENT, IT'S CLEAR THAT YOU ARE
16 TALKING ABOUT THE CHROMOSOMAL DNA BECAUSE YOU ARE MAKING
17 TRANSGENIC ORGANISMS.

18 SO WE BELIEVE UNDER FEDERAL CIRCUIT LAW WE ARE
19 ENTITLED TO A FINDING THAT THESE ARE NOT SUBSTANTIAL
20 AMENDMENTS TO THE '605 PATENT. THERE IS NO DISPUTE THAT
21 THERE -- THERE SHOULDN'T BE ANY DISPUTE THAT WE DIDN'T
22 SUBSTANTIALLY AMEND AT LEAST SOME OF THE CLAIMS IN THE
23 '545 PATENT, AND IF THERE WERE A MARKMAN HEARING, I THINK
24 THAT WOULD PROVIDE A LOT OF CLARITY ON THESE ISSUES
25 BECAUSE THIS COURT IS THE ONLY ENTITY NOW STANDING THAT

1 CAN MAKE THOSE DECISIONS. IT'S IRRELEVANT TO THE PATENT
2 OFFICE. THEY CAN'T DO IT. THEY DON'T HAVE THE POWER TO.

3 SO I WOULD NOW LIKE TO TURN BACK TO SLIDE 2,
4 PLEASE. SO IN ADDITION TO THE PREJUDICE THAT WE WOULD
5 SUFFER, THERE ARE, OF COURSE, THREE QUESTIONS THAT COURTS
6 HAVE TYPICALLY ASKED WHEN DECIDING WHETHER TO GRANT OR
7 DENY A STAY, AND THOSE ARE THE STAGE OF THE LITIGATION,
8 WILL IT SIMPLIFY ALL OF THE ISSUES IF YOU ALLOW THE
9 PATENT OFFICE TO CONDUCT A REEXAMINATION TO COMPLETION
10 FIRST, AND IS THERE ANY PREJUDICE OR TACTICAL
11 DISADVANTAGE TO THE NON-MOVING PARTY IF THE STAY IS
12 GRANTED.

13 THE NEXT SLIDE SORT OF SUMMARIZES THE AMOUNT
14 OF DISCOVERY THAT HAS OCCURRED. I DON'T AGREE THAT THE
15 CASE IS ONLY ABOUT HALFWAY THROUGH DISCOVERY. THE
16 PARTIES EXCHANGED HUNDREDS OF THOUSANDS OF DOCUMENTS.

17 THE COURT: MR. RICHTER, I HATE TO INTERRUPT
18 YOU, BUT I WILL -- AND I WILL TELL MR. BASSETT -- THE
19 COURT DOESN'T BELIEVE IT IS HALFWAY THROUGH EITHER, BASED
20 ON THE SCHEDULING ORDER.

21 MR. RICHTER: OKAY.

22 THE COURT: SO IF EITHER SIDE THINKS THAT WE
23 HAVE GOT 50 PERCENT MORE TO GO IN TERMS OF DISCOVERY,
24 THEN YOU ARE SADLY --

25 MR. BASSETT: YOUR HONOR, IF I COULD CLARIFY,

1 I MUST HAVE BEEN MISHEARD. I SAID --

2 THE COURT: MR. BASSETT, I UNDERSTAND. I WAS
3 JUST MAKING A QUICK POINT THAT ONE WAY OR THE OTHER THE
4 COURT VIEWS THE CASE IS WELL BEYOND HALFWAY THROUGH, SO
5 ANYWAY.

6 MR. RICHTER: I WILL MOVE ON THEN, YOUR HONOR.
7 I DON'T THINK THERE IS MUCH MORE THAT NEEDS TO BE SAID
8 ABOUT THIS SLIDE OTHER THAN I WOULD JUST POINT OUT THAT
9 THE ONE AREA OF DISCOVERY THAT IS STILL GOING ON IS THIRD
10 PARTY FACT DISCOVERY FOR PIONEER.

11 AND THE REASON, SINCE YOU DID MENTION THE
12 SCHEDULING ORDER AND THE DATE THAT IS LONG PASSED, THE
13 REASON THAT IS STILL GOING ON IS THAT IS NECESSARY TO OUR
14 EXPERT REPORT ON INFRINGEMENT AND, IN FACT, PIONEER HAS
15 BEEN MONITORING THIS MOTION TO STAY. AND BEFORE
16 PRECISION EVEN FILED A MOTION, PIONEER WAS INDICATING TO
17 THE IOWA COURT THAT THEY THOUGHT THEY SHOULDN'T HAVE TO
18 GO FORWARD WITH THE FACT DISCOVERY OF THEM UNTIL THIS
19 MOTION WAS DECIDED.

20 WE DIDN'T TELL THEM THAT IT WAS INTENDED TO
21 FILE THIS MOTION, SO OBVIOUSLY THEY MUST HAVE LEARNED IT
22 FROM PRECISION, AND FROM OUR PERSPECTIVE, THEY ARE TRYING
23 TO USE THAT TO SLOW DOWN THE DISCOVERY IN IOWA.

24 THAT HAS SINCE BEEN DECIDED AGAINST THEM. AND
25 WE ARE TRYING TO MOVE FORWARD WITH THAT, ALTHOUGH IT'S

1 NOT GOING AS QUICKLY AS WE WOULD LIKE.

2 THE FINAL THING I WOULD JUST SAY ON THE
3 SCHEDULE, ALTHOUGH I DON'T BELIEVE IT'S RELEVANT TO THIS
4 MOTION, IS THAT CELLECTIS DISPUTES THAT WE DID ANYTHING
5 TO SLOW DOWN THE DISCOVERY PROCESS. THAT IS SIMPLY NOT
6 TRUE. WE HAVE PRODUCED HUNDREDS OF THOUSANDS OF
7 DOCUMENTS. WE HAVE PRODUCED OUR WITNESSES. ALL OF THE
8 WITNESSES CAME FROM FRANCE AND APPEARED IN NEW YORK. WE
9 DID EVERYTHING WE COULD TO FACILITATE EXPEDITIOUS
10 DISCOVERY IN THIS CASE.

11 IF WE CAN GO TO THE NEXT SLIDE, PLEASE. THE
12 SECOND CONSIDERATION IS, YOU KNOW, WHETHER THE
13 REEXAMINATION WILL ADDRESS ALL THE TRIAL ISSUES.
14 PRECISION HAS TRIED TO DISCOUNT OUR SUPPLEMENTAL COUNTS
15 FOR UNFAIR COMPETITION, LIBEL PER SE, AND THE LANHAM ACT
16 VIOLATIONS. WE TAKE THOSE COUNTS VERY SERIOUSLY.

17 THE PATENT OFFICE HAS NO BEARING. THE
18 DETERMINATION OF THE REEXAMINATION HAS NO BEARING ON
19 THOSE COUNTS.

20 PRECISION HAS TRIED TO CONTEND THAT IF THEY
21 ARE RIGHT AND THE REEXAMINATION GOES TO COMPLETION AND
22 ALL THE CLAIMS STAND REJECTED, THAT SOMEHOW EXCUSES THE
23 UNFAIR AND DECEPTIVE STATEMENTS IN THEIR PRESS RELEASES.
24 WE COMPLETELY DISAGREE. AS SET FORTH IN EXHIBITS O
25 THROUGH S OF OUR OPPOSITION TO THIS MOTION TO STAY, THOSE

1 PRESS RELEASES STAND ON THEIR OWN AS UNFAIR COMPETITION.
2 THEY SUGGESTED TO THE PUBLIC THAT THE PATENT OFFICE HAD
3 DETERMINED THAT CELLECTIS AND PASTEUR HAD ENGAGED IN
4 INEQUITABLE CONDUCT AND FRAUD, AND THE IMPACT OF THEM WAS
5 SEVERE.

6 WITHIN HOURS OF THE PRESS RELEASES GOING OUT,
7 CELLECTIS' STOCK TANKED 20 PERCENT. IT CAME BACK AFTER
8 THAT, BUT THE DAMAGE HAD BEEN DONE TO CELLECTIS' PATENT
9 AND BUSINESS VALUATION, AND IT APPEARS TO HAVE BEEN
10 INTENDED DAMAGE. IN SUBSEQUENTLY PRODUCED DOCUMENTS, IT
11 WAS LEARNED THAT PRECISION INTENTIONALLY ATTACKED
12 CELLECTIS' STOCK TICKER TO THE PRESS RELEASE WITH THE
13 IDEA THAT IT WOULD BE MONITORED BY THE INVESTMENT
14 COMMUNITY.

15 AT LEAST ONE OF PRECISION'S OFFICERS INDICATED
16 IN AN E-MAIL THAT HE WAS A LITTLE CONCERNED ABOUT THE
17 SEVERITY OF THE PRESS RELEASE. HE WASN'T SURE THEY
18 SHOULD DO IT. AND THEY DID IT ANYWAY. THEY ATTACHED THE
19 STOCK PRICE, AND THEN IT WAS SHOWN IN ADDITIONAL E-MAILS
20 THAT THEY MONITORED THAT STOCK PRICE AFTER THE PRESS
21 RELEASE TO SEE WHAT AFFECT IT WOULD HAVE.

22 SO WE TAKE THAT VERY SERIOUSLY, THAT THE
23 PATENT OFFICE CANNOT DO ANYTHING TO ALTER THE HISTORY OF
24 THE WAY THOSE PRESS RELEASES WERE MADE AND THE INTENT
25 BEHIND THOSE PRESS RELEASES. AND WE THINK OUR UNFAIR

1 COMPETITION AND LIBEL PER SE AND LANHAM ACT VIOLATIONS
2 WILL STAND. THEY STAND ON THEIR OWN. THEY HAVE NOTHING
3 TO DO WITH THE REEXAMINATION.

4 AND FINALLY ON THIS POINT, WE NOTE THAT
5 PRECISION SORT OF ASSUMES THAT THEY ARE GOING TO WIN IN
6 THE PATENT OFFICE.

7 ONE OTHER POINT ON THE PRESS RELEASES. THEY
8 WERE, IN FACT -- THERE IS ANOTHER E-MAIL THAT INDICATES
9 THAT THEY WERE, IN FACT, TIMED APPROPRIATELY BECAUSE THEY
10 KNEW THAT CELLECTIS WOULD SHORTLY THEREAFTER HAVE A
11 SHAREHOLDERS' MEETING. SO THEY WERE DIRECTED AND
12 TARGETED AT THE SHAREHOLDERS WITH AN INTENT TO HARM
13 CELLECTIS, AND THEY WERE UNFAIR AND THEY SUGGESTED THINGS
14 THAT ARE SIMPLY NOT TRUE, AND WE STAND BEHIND AND INTEND
15 TO PURSUE THOSE SUPPLEMENTAL COUNTS.

16 FINALLY, I WOULD JUST SAY, THERE HAS BEEN --
17 IT'S A LITTLE MURKY, I THINK, FROM MR. BASSETT'S
18 PRESENTATION ABOUT THE STATUS OF THE REEXAMINATION. IT'S
19 POSSIBLE THAT THE REEXAMINATION WILL NOT RESOLVE ANY OF
20 THE ISSUES IF CELLECTIS PREVAILS OR PASTEUR PREVAILS IN
21 THOSE REEXAMINATIONS.

22 NONE OF THE OFFICE ACTIONS IS FINAL. THEY ARE
23 TITLED AS (QUOTE) "CLOSING PROSECUTION", BUT WE CAN'T --
24 PASTEUR CANNOT APPEAL FROM THOSE OFFICE ACTIONS AS THEY
25 STAND RIGHT NOW.

1 MOREOVER, IT'S NOT DEFINITE THAT THERE WILL
2 ONLY BE ONE MORE SUBMISSION FROM THE PATENT OWNERS.
3 YOU ARE ALLOWED TO PUT A SUBMISSION IN AFTER AN ACTION
4 CLOSING PROSECUTION. YOU CANNOT APPEAL THAT YET. YOU
5 CAN PUT A SUBMISSION IN.

6 THE PATENT OFFICE CAN DO ANY ONE OF A NUMBER
7 OF THINGS. THEY COULD COME BACK AND GIVE YOU A FINAL
8 APPEALABLE OFFICE ACTION, BUT THEY MIGHT NOT DO THAT.
9 THEY MIGHT REOPEN PROSECUTION. THE PATENT OWNERS MIGHT
10 PUT AN ADDITIONAL PAPER IN AFTER THAT. THEN PRECISION
11 WOULD BE ENTITLED TO COMMENT ON THAT PAPER.

12 SO IT'S NOT A DEFINITE ONE MORE ACT TO FINAL
13 APPEALABILITY. THERE IS A WHOLE NUMBER OF THINGS THAT
14 COULD HAPPEN TO DRAG THIS PROCESS OUT FURTHER, AND IF WE
15 PREVAIL, THE PATENT OFFICE WILL HAVE DETERMINED NOTHING
16 THAT HELPS THIS CASE IN ANY WAY.

17 THE NEXT SLIDE SPEAKS TO THE PREJUDICE THAT
18 CELLECTIS WILL SUFFER WITH REGARD TO PRECISION'S DELAY IN
19 FILING FOR REEXAMINATION. I THINK IT'S IMPORTANT TO NOTE
20 THAT THE FIRST REQUEST FOR REEXAMINATION THAT PRECISION
21 MADE WAS NOT WITH RESPECT TO THE PATENTS-IN-SUIT. IT WAS
22 WITH RESPECT TO TWO DIFFERENT PATENTS THAT ARE RELATED TO
23 THE PATENTS-IN-SUIT, BUT THEY ARE DIFFERENT STAND ALONE
24 PATENTS.

25 SO FROM OUR PERSPECTIVE, PRECISION WAS

1 ESSENTIALLY USING THE PATENT OFFICE AS A FOCUS GROUP.
2 LET'S TEST OUT OUR ARGUMENTS AND SEE IF THEY WORK. AND
3 IF THEY DO, THEN WE'LL ACTUALLY GO TO THE REAL DEAL AND
4 REQUEST REEXAMINATION OF THE PATENTS-IN-SUIT. AND THAT
5 IS EXACTLY WHAT THEY DID AND THAT CONTRIBUTED TO THE
6 DELAY THAT HAS BROUGHT US TO THIS POINT WHERE WE ARE
7 FACED WITH THE POTENTIAL EXPIRATION OF OUR PATENTS IN
8 2012 BEFORE THE REEXAMINATION PROCESS IS EVEN DONE.

9 IF THEY WANTED TO REEXAMINE THE
10 PATENTS-IN-SUIT, THEY SHOULD HAVE DONE THAT INITIALLY.
11 AND THERE IS NO QUESTION THAT THEY KNEW ABOUT THE PRIOR
12 ART BECAUSE IT'S IN THEIR ANSWER TO OUR COMPLAINT. SO
13 IT'S NOT LIKE A SITUATION WHERE THEY ONLY DISCOVERED THE
14 PRIOR ART LATER ON AND THEY COULDN'T HAVE MADE THE
15 REQUEST FOR REEXAMINATION. THERE IS SIMPLY NO EXCUSE FOR
16 THE 16 MONTHS DELAY IN REQUESTING REEXAMINATION OF THE
17 PATENTS-IN-SUIT AND AN ADDITIONAL SIX MONTHS BEFORE
18 FILING THIS MOTION.

19 WE HAVE ALREADY COVERED THE ISSUE OF AN
20 INJUNCTION. I THINK WE HAVE DEMONSTRATED THAT WE ARE
21 STILL ENTITLED TO AN INJUNCTION. WE ARE ALSO ENTITLED TO
22 AN INJUNCTION IN ADDITION TO THE PATENT CLAIMS. WE ARE
23 ENTITLED TO AN INJUNCTION ON THE UNFAIR COMPETITION AND
24 LIBEL PER SE AND LANHAM ACT CLAIMS.

25 THE COURT: DID YOU REQUEST THAT? IT HASN'T

1 BEEN REQUESTED IN THE MOTION. IS IT REQUESTED IN YOUR
2 PRAYER FOR RELIEF?

3 MR. RICHTER: IT'S IN OUR PRAYER FOR RELIEF,
4 YES, YOUR HONOR.

5 AND I THINK THAT IS IMPORTANT, YOUR HONOR, TO
6 POINT OUT THAT COURTS DO, IN FACT, HOLD TRIALS ON CLAIMS
7 THAT ARE UNDER REEXAMINATION WHEN AN INJUNCTION IS BEING
8 SOUGHT, AND I THINK THAT IS IMPORTANT IN THIS CASE TO
9 CLEAR THE AIR.

10 PRECISION AND CELLECTIS ARE CLEARLY
11 COMPETITORS. THEY ARE COMPETING FOR SOME OF THE SAME
12 CUSTOMERS. I THINK THE AIR NEEDS TO BE CLEARED WITH
13 RESPECT TO THE UNFAIR COMPETITION STATEMENTS THAT HAVE
14 BEEN MADE AND WITH REGARD TO THE PATENT INFRINGEMENT
15 BECAUSE IF WE WAIT UNTIL THE REEXAMINATION IS DONE, IF
16 THE CASE IS STAYED AND WE WAIT, THAT DAMAGE WILL NEVER BE
17 RECOVERABLE BECAUSE THE PARTIES THAT ENGAGE OR THAT
18 ENGAGE THE CELLECTIS'S OF THE WORLD AND THE PIONEERS OF
19 THE WORLD FOR THEIR ENDONUCLEASES ARE BIG COMPANIES THAT
20 NEED CERTAINTY AS TO WHOM THEIR PARTNERS ARE, AND THEY
21 ARE NOT GOING TO WAIT FOR THE REEXAMINATION IF THIS CASE
22 IS STAYED. THEY ARE GOING TO MOVE FORWARD. CELLECTIS IS
23 GOING TO LOSE THOSE CUSTOMERS, POTENTIALLY, AND THAT
24 CAN'T BE COMPENSATED BY MONETARY DAMAGES. THOSE
25 PARTNERSHIPS ARE GOING TO GO FORWARD AND NOT BE

1 RECOVERABLE.

2 THE NEXT SLIDE JUST DEMONSTRATES GRAPHICALLY
3 THE TIME PERIOD THAT RESULTED IN THIS DELAY. AND I WILL
4 JUST NOTE A COUPLE OF THE DATES, THAT WE FILED THIS
5 COMPLAINT IN MARCH OF 2008, AND THE REEXAMINATION
6 REQUESTS WERE NOT MADE UNTIL JULY OF 2009.

7 AND THE MOTION TO STAY WAS NOT MADE UNTIL
8 FEBRUARY OF 2010, AFTER THEY -- THE PATENT OFFICE HAD
9 TAKEN SOME ACTION. SO AGAIN, THAT IS A TOTAL OF 22
10 MONTHS, AND WE BELIEVE IT'S PREJUDICIAL TO CELLECTIS.

11 NOW, ONE QUESTION IS WHY DID THEY DELAY. YOU
12 KNOW, WHY DID THEY TAKE THAT MANY MONTHS. AND A
13 POTENTIAL ANSWER TO THAT QUESTION, AND THE REASON THEY
14 MAY WANT TO STAY THIS CASE NOW PENDING THE REEXAM AND
15 WAITING UNTIL OUR PATENTS EXPIRE IS THAT IF THEY HAD
16 REQUESTED THE STAY EARLIER OR THEY HAD REQUESTED THE
17 REEXAMINATION EARLIER AND THEY LOST IN THE PATENT OFFICE,
18 THEN THEY WOULD BE ESTOPPED IN THE TRIAL FROM RAISING ANY
19 OF THE SAME ARGUMENTS THAT THEY MADE OR COULD HAVE MADE
20 DURING THE REEXAMINATION IN THIS TRIAL.

21 SO, IN OTHER WORDS, YOU CAN'T MAKE PRIOR ART
22 ARGUMENTS TO THE PATENT OFFICE, LOSE, AND THEN MAKE THE
23 SAME ARGUMENTS TO A FEDERAL COURT WHEN YOU REQUESTED
24 INTER PARTES EXAMINATION WHICH IS A NEW FORM OF
25 REEXAMINATION.

1 SO WE BELIEVE THAT IS A REASON THAT THEY ARE
2 TRYING TO STAY THIS CASE, WAIT FOR THE PATENTS TO EXPIRE,
3 AND AVOID A TRIAL. AND THAT IS THE REASON WHY THEY TOOK
4 SO LONG TO REQUEST THAT REEXAMINATION WHEN THEY COULD
5 HAVE DONE IT A LOT EARLIER.

6 THE NEXT SLIDE EXPANDS SORT OF ON WHAT WE
7 BELIEVE THE LIKELY SCHEDULE WOULD BE IN THE
8 REEXAMINATION. SO OUR PATENTS EXPIRE IN MAY OF 2012.
9 ASSUMING -- EVEN ASSUMING THAT YOU HAVE A FINAL
10 APPEALABLE DECISION FROM THE PATENT OFFICE IN THE
11 REEXAMINATION SOMETIME IN THE SECOND HALF OF 2010, WHICH
12 AGAIN MAY NOT OCCUR. IT COULD BE THAT THE PATENT OWNERS
13 PREVAIL. IT COULD BE THAT THE PATENT OFFICE WANTS AN
14 ADDITIONAL ROUND OF SUBMISSIONS FROM THE PATENT OWNER AND
15 FROM PRECISION. SO THAT THAT MAY NOT EVEN BE A CORRECT
16 ASSUMPTION. IT MAY BE 2011 BEFORE WE EITHER PREVAIL OR
17 THERE IS A FINAL APPEALABLE DECISION.

18 BUT ASSUMING THAT IS THE CASE, THE
19 REEXAMINATION, IN OUR VIEW, IS NOT LIKELY TO END UNTIL
20 2013 OR 2015, AND THE REASON FOR THAT IS THAT THE INTER
21 PARTES REEXAM IS A VERY NEW PROCEEDING. I THINK IT WAS
22 ESTABLISHED IN AROUND 2001. THERE HAVEN'T BEEN THAT
23 MANY.

24 WHEN YOU TALK ABOUT STATISTICS OF THE AVERAGE
25 PENDENCY OF AN INTER PARTES REEXAM, IT'S REPORTED

1 RECENTLY AT 36 AND A HALF MONTHS. BUT WHEN YOU LOOK
2 BEHIND THOSE STATISTICS -- AND WE HAVE AN ARTICLE FROM
3 MR. R. SHANG WHO DID JUST THAT. IN FACT, THAT IS MUCH
4 SHORTER THAN IT OTHERWISE WOULD BE IF THE PARTIES WERE
5 ACTUALLY APPEALING THE FINAL REJECTIONS.

6 SO, IN OTHER WORDS, I THINK THERE HAS BEEN
7 ABOUT 700 INTER PARTES REEXAMS SINCE ITS INCEPTION.
8 ACCORDING TO MR. SHANG, ONLY THREE OF THOSE HAVE THUS FAR
9 GONE FROM A FINAL REJECTION TO AN APPEAL TO THE BOARD.
10 IN A COUPLE OF INSTANCES AMONG THOSE THREE, IT TOOK TWO
11 YEARS TO GET A DECISION FROM THE BOARD. SO THE 36 AND A
12 HALF MONTHS IS REALLY REPORTING ON THE AVERAGE PENDENCY
13 FROM THE REQUEST TO A FINAL REJECTION ALLOWING IT TO
14 APPEAL BECAUSE IN MANY OF THOSE INSTANCES THERE WAS NO
15 APPEAL.

16 AND SO IF YOU -- IF YOU ARE TALKING ABOUT 2011
17 BEFORE WE GET A FINAL, ASSUMING THINGS DON'T GO WELL FOR
18 THE PATENT OWNERS AND YOU GET A FINAL REJECTION, THEN
19 IT'S PROBABLY GOING TO BE 2013 BEFORE THE BOARD FINALLY
20 DECIDES THAT AND THEN ANOTHER YEAR FOR THE FEDERAL
21 CIRCUIT, TYPICALLY, WOULD BE 2014.

22 SO IT'S POSSIBLE THAT WE WILL NEVER HAVE A
23 PATENT IF YOU STAY THE CASE BECAUSE THEY ARE GOING TO
24 EXPIRE IN 2012 ANYWAY, AND THEN WE WOULD LOSE ALL OF OUR
25 RIGHTS TO A POTENTIAL INJUNCTION THAT WE THINK ARE VERY

1 REAL AND PREJUDICIAL IF THEY ARE STRIPPED FROM CELLECTIS.

2 THE NEXT SLIDE JUST SHOWS IN VERY BRIEF
3 SUMMARY SOME OF THE CASES THAT WERE CITED IN OUR BRIEF
4 WHERE COURTS HAVE DENIED STAY REQUESTS IN CIRCUMSTANCES
5 THAT ARE VERY SIMILAR TO THOSE FOUND HERE.

6 AND THE FIRST CASE, THE GEORGE KESSEL CASE,
7 THE COURT NOTED IN DENYING THE STAY THAT ALL OF THE
8 ISSUES WOULD NOT BE SIMPLIFIED BECAUSE THE PTO REEXAM
9 CANNOT ADDRESS THE TRADEMARK CLAIMS THAT WERE ALSO
10 PENDING IN ADDITION TO PATENT INFRINGEMENT CLAIMS.

11 THAT IS ANALOGOUS TO HERE WHERE WE HAVE OUR
12 UNFAIR COMPETITION CLAIMS AND THAT IS A REASON FOR
13 DENYING THE STAY REQUEST HERE.

14 IN THE XEROX CASE, THE DEFENDANT WAS AWARE OF
15 THE REEXAMINATION PRIOR ART IN MARCH OF 1998, BUT DIDN'T
16 FILE A REEXAM REQUEST UNTIL OCTOBER OF 1998 AFTER THE
17 COURT ISSUED AN ADVERSE SUMMARY JUDGMENT DECISION AGAINST
18 IT. THAT IS AN EVEN SHORTER PERIOD THAN HERE WHERE THE
19 COMPLAINT WAS FILED IN MARCH OF 2008, AND THE REQUEST
20 WASN'T FILED UNTIL JULY OF 2009.

21 AND IT'S ANALOGOUS IN THE SENSE THAT I THINK
22 MR. BASSETT IS INDICATING THAT THEY EXPECTED TO WIN THE
23 MOTION TO DISMISS AND THEY DIDN'T, AND SO NOW THEY ARE
24 PURSUING REEXAMINATION AND THE STAY.

25 AND THEN FINALLY THE BARTEX CASE IS PROBABLY

1 THE CASE MOST CLOSELY ON POINT BECAUSE THERE THE COURT
2 FOUND THAT THE 16 MONTHS DELAY BY FEDEX IN FILING THE
3 PATENT OFFICE REQUEST FOR REEXAMINATION WAS JUST TOO LONG
4 AND THERE WAS PREJUDICE TO THE PLAINTIFF AND THEY,
5 THEREFORE, DENIED THE STAY.

6 IN THAT CASE, THE TRIAL WAS ABOUT NINE MONTHS
7 AWAY FROM THE DECISION, AND I THINK THAT IS -- IT'S HARD
8 TO SAY. I DON'T KNOW THE COURT'S CALENDAR OR SCHEDULE,
9 BUT I THINK SIX MONTHS FROM NOW WE CAN HAVE A TRIAL IF
10 THE CASE IS NOT STAYED AND THERE WAS A MARKMAN HEARING
11 AND WE COMPLETED EXPERT DISCOVERY.

12 THE NEXT SLIDE SHOWS, BECAUSE THERE ARE SO
13 MANY CASES IN CELLECTIS OR IN PRECISION'S BRIEF THAT WE
14 TRIED JUST TO IN BULLET POINTS DESCRIBE THE KINDS OF
15 FACTS IN THE CASES THAT THEY CITE FOR THE PROPER
16 SITUATION THAT A STAY IS APPROPRIATE AND POINT OUT THAT
17 THOSE FACTS ARE NOT PRESENT IN OUR CASE.

18 FOR EXAMPLE, IN THE ASCII COURT CASE THERE WAS
19 LITTLE OR NO DISCOVERY THAT OCCURRED. IN THE BROADCAST
20 INNOVATION CASE, THE PLAINTIFF WAS ONLY SEEKING MONETARY
21 DAMAGES AND INJUNCTION WAS NOT SOUGHT, SO THERE WAS NOT
22 THE DEGREE OF PREJUDICE THAT THERE IS HERE.

23 IN THE GIOELLO ENTERS. VS. MATTEL, THE
24 PATENTEE WAS NOT SELLING ANYTHING RECOVERED BY THE
25 PATENTS-IN-SUIT. THAT IS NOT TRUE. IN A BUNCH OF CASES,

1 THE TAP PHARM CASE, THE CORNERSTONE CASE, K.L.A. CASE, A
2 NUMBER OF OTHERS, THE REEXAMINATION REQUEST WAS MADE TO
3 THE PATENT OFFICE BEFORE THE LAWSUIT WAS EVEN FILED OR
4 SHORTLY AFTER IT WAS FILED AS OPPOSED TO THE BIG DELAY
5 HERE.

6 IN THE EARHART CASE THE PRIOR ART WAS
7 DISCOVERED DURING THE COURSE OF THE LITIGATION AS OPPOSED
8 TO HERE WHERE IT'S CLEAR THEY KNEW ABOUT IT FROM THE
9 BEGINNING.

10 IN A NUMBER OF CASES, INCLUDING THE INSITUFORM
11 CASE THAT MR. BASSETT SINGLED OUT IN HIS PRESENTATION,
12 THAT PATENTEE KNEW OF THE INFRINGEMENT FOR MANY YEARS.
13 SO, FOR EXAMPLE, IN INSITUFORM, THE PATENTEE WAS AWARE OF
14 THE LAWSUIT FOR SIX YEARS, SO IT'S HARD FOR THE PATENTEE
15 TO SAY I AM PREJUDICED BY STOPPING THE LAWSUIT NOW.

16 THAT IS NOT TRUE HERE. WE FILED THE LAWSUIT
17 WHEN WE KNEW ABOUT IT.

18 AND FINALLY, THERE WAS A CASE, SORENSEN WHERE
19 THE PATENTS-IN-SUIT WERE EXPIRING BEFORE THE TRIAL COULD
20 OCCUR. THAT IS NOT THE CASE HERE. WE CAN HAVE A TRIAL
21 BEFORE MAY OF 2012, I WOULD RESPECTFULLY SUBMIT.

22 AND THEN FINALLY ON SLIDE 10, THERE IS ANOTHER
23 ISSUE THAT I THINK IS IMPORTANT WITH RESPECT TO EXAMINING
24 WHY PRECISION -- IT WOULD BE IN THEIR INTEREST TO RUN OUT
25 THE CLOCK ON THE LIFE OF OUR PATENTS, AND THAT IS THIS.

1 IF WE DO HAVE A TRIAL UNDER 35 U.S.C. 317(B),
2 IF THERE IS A TRIAL AND CELLECTIS PREVAILS AND GETS A
3 JURY VERDICT THAT THE PATENTS ARE NOT INVALID AND THAT
4 WERE TO BE AFFIRMED BY THE FEDERAL CIRCUIT BEFORE THE
5 PATENT OFFICE COMPLETED ITS REEXAMINATION, THE REEXAM
6 WOULD BE SUSPENDED.

7 AND IT'S ONE THING IF YOU REQUEST THE REEXAM
8 EARLY ON, BUT IF YOU WAIT AND DELAY AND SAY, NO, NO,
9 LET'S STOP THE TRIAL, LET'S LET THE PATENT OFFICE DO ITS
10 WORK, THAT IS COMPLETELY UNFAIR WHEN CONGRESS SET IT UP
11 SO IF YOU DID GET AN EARLY TRIAL AND YOU WERE ABLE TO
12 CONVINCE A JURY AND GET A FINDING OF NOT INVALID AND THE
13 FEDERAL CIRCUIT AFFIRMED, THERE SHOULDN'T BE
14 REEXAMINATION ON THE SAME PRIOR ART LITIGATED IN THE
15 FEDERAL COURT.

16 THE COURT: MR. RICHTER, AGAIN, I HATE TO
17 INTERRUPT, BUT YOU HAVE RAISED AN ISSUE THAT TROUBLES ME.
18 IF I DENY THE MOTION TO STAY AND WE MOVE FORWARD, YOU
19 PREVAIL, AND TRIAL BEFORE THE FEDERAL COURT HAS A RIGHT
20 TO THE PATENT OFFICE COMES BACK AND SAYS THAT YOUR
21 PATENTS ARE INVALID.

22 MR. RICHTER: THEN, YOUR HONOR --

23 THE COURT: SO WHAT HAPPENS IN THAT SCENARIO?

24 I UNDERSTAND WHERE YOU PREVAIL AND ALL THAT,
25 BUT WHAT WAS -- IF YOU HAVE AN ADVERSE FINDING IN THE

1 MIDDLE WHILE THE CASE IS STILL PENDING BEFORE THE FEDERAL
2 CIRCUIT ON APPEAL.

3 MR. RICHTER: YOU WOULD BE ON THE CUTTING EDGE
4 BECAUSE I DON'T BELIEVE THERE IS A CASE ON THAT POINT,
5 BUT I DID READ THE MANUAL OF PATENTS EXAMINING PROCEDURE
6 ON THAT POINT, AND I BELIEVE THERE IS A PROVISION IN
7 THERE THAT ALLOWS THE PATENT OFFICE -- THE PEOPLE THOUGHT
8 THESE RULES THROUGH WHEN THEY SET THEM UP FOR THAT VERY
9 REASON THERE, AND YOU ASK IF YOU HAVE A JURY VERDICT ON A
10 FINDING OF NON-INVALID, THE PATENT OFFICE WILL CONSIDER A
11 REQUEST TO STAY THE FEDERAL EXAMINATION WHILE THE FEDERAL
12 CIRCUIT IS REVIEWING AND DECIDING WHETHER TO AFFIRM.

13 THE COURT: IT'S THE FLIP SIDE OF WHAT WE HAVE
14 NOW.

15 MR. RICHTER: YES. I AGREE. IT'S THE FLIP
16 SIDE, BUT THEY WOULD ARGUE THEY WANT WHAT WE WANT, BUT WE
17 DIDN'T DELAY, SO THAT IS THE DIFFERENCE. IT WOULD BE ONE
18 THING IF THEY REQUESTED REEXAM BEFORE THE CASE STARTED,
19 BUT THE FACT THAT THEY DELAYED, WE THINK WE SHOULD NOT BE
20 ESTOPPED FROM GOING FORWARD WITH THIS CASE. AT LEAST NOT
21 NOW. IT'S DEFINITELY PREMATURE.

22 I THINK WE ALREADY COVERED THE SUBSTANTIAL
23 AMENDMENT TO THE CLAIMS WHICH WE DISPUTE. MY FINAL POINT
24 WOULD JUST BE MR. BASSET MADE A LOT OF COMMENTS ABOUT
25 PATENT OWNERS AND CELLECTIS HIDING PRIOR ART, AND DOING

1 THINGS DECEPTIVE IN FRONT OF THE PATENT OFFICE. THAT IS
2 NOT TRUE.

3 IF WE CAN GO TO SLIDE 24, PLEASE, ONE OF THEIR
4 MAJOR REFERENCES THAT THEY CITE IN TERMS OF INVALIDITY
5 AND TERMS OF SUPPOSEDLY INEQUITABLE CONDUCT WAS GIVEN TO
6 THE PATENT OFFICE DURING PROSECUTION OF THE APPLICATION
7 THAT LED TO THE PATENTS-IN-SUIT. THE BELL-PEDERSON RUNS
8 ON JULY 23, 2003, WAS GIVEN TO THE PATENT OFFICE.
9 MOREOVER, THEY HAVE DEPOSED THE PRIMARY INVENTORS AND THE
10 ATTORNEYS. THERE IS NO SCINTILLA OF ANY EVIDENCE THAT
11 ANYBODY INTENTIONALLY DID ANYTHING TO TRY TO DEPRIVE THE
12 PATENT OFFICE. IT'S NOT TRUE.

13 THIS ISSUE ABOUT BROADENING THE CLAIMS, THE
14 CLAIMS ARE REVIEWED BY THE PATENT OFFICE UNDER THEIR
15 RULES AND REGULATIONS AT THE FULL SCOPE AND BREADTH THAT
16 THEY WERE PRESENTED TO THE PATENT OFFICE. THAT IS A
17 REQUIREMENT OF THAT ADMINISTRATIVE BODY.

18 IF THERE IS SOMETHING WRONG WITH BROADENING
19 THE CLAIMS, THEN I DON'T THINK A PATENT OWNER WOULD HAVE
20 A PROBLEM. THERE IS NOTHING IMPROPER ABOUT THAT. PEOPLE
21 DO IT EVERY DAY. IT'S ALLOWED FOR UNDER THE PATENT
22 OFFICE RULES AND PROCEDURES. THEY REVIEW THE PROCEDURE
23 TO SEE IF YOU ARE BROADENING BEYOND THE SCOPE OF THE
24 SPECIFICATION. THEY SEE IF YOU ARE TRYING TO CLAIM MORE
25 THAN YOU ARE ENTITLED TO. THAT WAS MADE. THE PATENT

1 OFFICE AGREED THAT THEY ARE ENTITLED TO THE FULL BREADTH
2 AND SCOPE OF THE CLAIM THAT THEY SUBMITTED.

3 SO THE IDEA THAT THERE IS SOMETHING UNTOWARD
4 GOING ON IS JUST NOT TRUE OR THAT ANYTHING IS HIDDEN IS
5 JUST NOT TRUE.

6 IF YOU LOOK AT THE NEXT SLIDE, PLEASE, SLIDE
7 25, THE BELL-PEDERSON REFERENCE IS SMACK IN THE MIDDLE OF
8 THE PATENTS-IN-SUIT. IF THEY WERE TRYING TO HIDE IT,
9 THEY WERE DOING A POOR JOB PUTTING IT IN THE MIDDLE OF
10 THE PATENT.

11 THE SAME THING WITH THE DELAHODDE, ANOTHER
12 REFERENCE THAT PRECISION SAYS WAS IMPROPERLY WITHHELD.
13 IT'S SMACK IN THE MIDDLE OF THE PATENTS-IN-SUIT. NOBODY
14 WAS TRYING TO HIDE ANYTHING. NOBODY DID ANYTHING
15 UNTOWARD, AND THERE IS NOTHING TO THAT ALLEGATION AND WE
16 OPPOSE THAT.

17 FINALLY, I WOULD SAY THAT CELLECTIS BELIEVES
18 THAT THERE ARE VERY GOOD ARGUMENTS AGAINST THE REJECTIONS
19 THAT NOW STAND IN THE PATENT OFFICE AND THEY DO EXPECT TO
20 PREVAIL AND THEY CERTAINLY SHOULDN'T BE STRIPPED OF THEIR
21 LITIGATION BECAUSE PRECISION BELIEVES THAT THEY ARE RIGHT
22 AND CELLECTIS IS WRONG.

23 THE COURT: I WOULD BE DISAPPOINTING YOU AND
24 MR. BASSETT IF YOU DIDN'T THINK YOU WERE GOING TO
25 PREVAIL. YOUR CLIENTS WOULD BE EVEN MORE DISAPPOINTED.

1 ALL RIGHT. THANK YOU, MR. RICHTER. MR.
2 RICHTER, BEFORE I LET YOU STEP DOWN, -- WELL, I CAN
3 LET MR. BASSETT RESPOND BRIEFLY.

4 MR. BASSETT: THANK YOU, YOUR HONOR. YES,
5 VERY BRIEFLY, YOUR HONOR, A COUPLE OF POINTS, AND MR.
6 RICHTER, AT THE BEGINNING OF HIS PRESENTATION TALKED
7 ABOUT THE AMENDMENTS OF ADDING "EUKARYOTIC" TO THE
8 INDEPENDENT CLAIM OF '545, NOT ALTERING THE SCOPE OF THE
9 DEPENDENT CLAIM 10 AND CLAIM 12 LIMITING TO MAMMALIAN
10 CELLS.

11 YOUR HONOR, WHAT PRECISION DOES IS WORKS IN
12 PLANT CELLS. ALL OF ITS COMMERCIAL PRODUCTS AND
13 COMMERCIAL ACTIVITY RELATES TO PLANT CELLS. CLAIMS 10
14 AND 12 HAVE NOTHING TO DO -- THERE IS NO WAY THEY
15 INFRINGE THOSE CLAIMS WITH THEIR COMMERCIAL PRODUCTS.
16 EVERYTHING ELSE THAT MR. RICHTER CITED TO YOU SHOWING
17 SOME WORK IN THE PROJECT X, THAT IS EXPERIMENTAL AND
18 EXPERIMENTS ARE NOT INFRINGING ACTIVITY.

19 BUT EVEN IF THEY ARE, THERE IS NO DAMAGE.
20 THEY DON'T -- HAVEN'T DONE ANYTHING WITH THIS, SO I THINK
21 THAT IS AN ARGUMENT THAT MISDIRECTS FROM TWO RELEVANT
22 POINTS. THE CLAIMS THAT THEY IN GOOD FAITH ASSERT
23 AGAINST US IN LITIGATION HAVE BEEN SUBSTANTIALLY NARROWED
24 IN THE PROSECUTION BY ADDING "EUKARYOTIC" TO THE
25 LIMITATION.

1 AS TO THE '605 PATENT, MR. RICHTER ARGUED THAT
2 ADDING "CHROMOSOMAL" TO THE MODIFIED DNA WAS IRRELEVANT,
3 WAS INHERENT ANYWAY BECAUSE DNA CANNOT BE PASSED TO
4 PROGENY UNLESS IT'S CHROMOSOMAL.

5 IN FACT, WE HAVE AN EXPERT THAT SAYS THAT IS
6 NOT TRUE. NON-CHROMOSOMAL MAY -- DNA CAN PASS CERTAIN
7 TRAITS ON, BUT EVEN MORE IMPORTANTLY, IF IT'S SO INHERENT
8 IN THE CLAIM, THEN WHY DID THE PATENT OFFICE REJECT THOSE
9 CLAIMS ON REEXAMINATION AND WHY DID THE PATENT ATTORNEY
10 NEVER MOVE TO AMEND TO ADD CHROMOSOMAL IF IT'S INHERENT.

11 WE THINK IT'S NOT INHERENT. THEY ARE ADDING
12 IT FOR A VERY OBVIOUS REASON.

13 YOUR HONOR, I APOLOGIZE IF I WAS
14 MISUNDERSTOOD, IF I SAID WE WERE HALFWAY THROUGH
15 DISCOVERY. WHAT I MEANT TO SAY -- AND I WOULD CLARIFY --
16 IS THAT WE WERE HALFWAY TO TRIAL FROM A COST AND
17 INCONVENIENCE AND PREJUDICE PERSPECTIVE FOR OUR CLIENT.

18 WHAT IS COMING UP IS EXPERT DISCOVERY,
19 DISPOSITIVE MOTIONS, PREPARING FOR TRIAL. I ASSURE THE
20 COURT THAT FROM MY CLIENT'S PERSPECTIVE, MORE THAN HALF
21 OF THE CASE IS STILL TO COME WHEN THEY SEE OUR BILLS.

22 THE COURT: I UNDERSTAND, MR. BASSETT.

23 MR. BASSETT: IF I COULD HAVE JUST A MOMENT,
24 YOUR HONOR.

25 THE COURT: TAKE WHATEVER TIME YOU NEED.

1 MR. BASSETT: AS I POINTED OUT WHEN I MADE MY
2 ORIGINAL ARGUMENTS, YOUR HONOR, CLEARLY THE AMENDMENTS IN
3 THE PROSECUTION IN THE REEXAM PROCESS HAVE BEEN ADDED TO
4 OVERCOME PRIOR ART IF THIS CASE GOES FORWARD.

5 THEREFORE, WE BELIEVE -- LET'S SAY THOSE
6 AMENDMENTS ARE ALLOWED. PRECISION SHOULD THEN BE ALLOWED
7 TO ALTER OR TO AMEND ITS INDIVIDUAL CONSTRUCTIONS IN
8 LIGHT OF THE AMENDMENTS AND IT MAKES NO SENSE TO HOLD
9 PRECISION TO THE VALIDITY ARGUMENTS THAT RELATE TO THE
10 CURRENT CLAIMS BEING ASSERTED.

11 YOUR HONOR, I THINK MR. RICHTER'S ESTOPPEL
12 ARGUMENTS SUPPORT A STAY HERE. IT IS TRUE THAT IN AN
13 INTER PARTES REEXAMINATION PROCESS THAT WE CAN BE AND ARE
14 ESTOPPED IF WE MAKE CERTAIN ARGUMENTS IN THE REEXAM
15 PROCESS, BUT IF THE PTO, IN FACT, REJECTS THOSE ARGUMENTS
16 AND WE WOULD BE ESTOPPED, WOULDN'T THE COURT WANT TO KNOW
17 THAT? WOULDN'T THAT BE IMPORTANT FOR PART OF THE PROCESS
18 SO WE DON'T REINVENT THE WHEEL AND HAVE THIS COURT AND
19 THE JURY DECIDE THE VALIDITY ISSUE THAT, IN FACT, WE
20 WOULD BE ESTOPPED FROM ARGUING UNDER THEIR ARGUMENT.

21 SO, IT'S -- TO ME, THAT SUGGESTS, IN FACT, IN
22 FAVOR OF A STAY TO SEE WHAT THE PATENT OFFICE IS GOING TO
23 DO.

24 MR. RICHTER CITED STATISTICS ABOUT THE TIMING
25 OF REEXAMS AND APPEALS, AND I AM NOT GOING TO CONTEST THE

1 STATISTICS AS AN AVERAGE, BUT, YOUR HONOR, THOSE ARE
2 GENERAL STATISTICS. THIS REEXAM PROCESS HAS MOVED WITH
3 LIGHTNING SPEEDS BY COMPARISON TO MOST REEXAMS IN THE
4 PATENT OFFICE, AND OUR SUGGESTION IS THAT BECAUSE THE
5 CLAIMS ARE SO CLEARLY INVALID AS THE EXAMINERS HAVE SAID,
6 THIS IS AN EASY ONE, LET'S MOVE IT ALONG.

7 THE FINAL POINT, YOUR HONOR, THE BARTEX CASE
8 THAT MR. RICHTER SAID IS ONE OF THE KEY CASES WHERE THE
9 MOTION FOR STAY WAS DENIED, IN THAT CASE THE DEFENDANT
10 FILED THE REQUEST FOR A STAY, THE MOTION FOR A STAY UPON
11 THE MERE GRANTING OF THE REEXAM PETITION.

12 THAT IS EXACTLY WHAT WE DID NOT DO, YOUR
13 HONOR. WE ARE BETWIXT AND BETWEEN. WE GET BLAME FOR
14 DELAY BECAUSE WE WAITED TO MAKE SURE THE PATENT OFFICE
15 ACTED ON THE SUBSTANCE OF THE CLAIM AND REJECTED BEFORE
16 WE FILED MOTION FOR A STAY, SO WE WEREN'T WASTING
17 ANYONE'S TIME FOR FILING A PREMATURE MOTION.

18 BUT NOW IT HAPPENED. THEY CITE THE BARTEX
19 CASE AGAINST US, BUT THAT WAS DENIED BECAUSE THE MOTION
20 WAS PREMATURE BECAUSE THE PATENT OFFICE SAID WE ARE GOING
21 TO REEXAMINE.

22 THE COURT: LET ME ASK, IF I CAN, ASK THE
23 PLAINTIFF TO PULL UP PAGE 7.

24 MR. BASSETT: THE QUESTION IS FOR ME?

25 THE COURT: YES, MR. BASSETT. THAT

1 SCHEDULE -- AND I THINK YOU HAVE PRETTY MUCH ANSWERED
2 THIS -- BUT MR. BASSETT, THAT WAS -- I MEAN, THAT IS A
3 LITTLE TROUBLING TO ME. I AM JUST GOING TO CANDIDLY TELL
4 YOU THE LENGTH OF TIME THERE, AND I UNDERSTAND YOUR
5 ARGUMENT IN RESPONSE THAT YOU ARE NOT CONTESTING THOSE
6 FIGURES, PER SE. I KNOW YOU HAVEN'T HAD A CHANCE TO, BUT
7 YOU ARE SAYING THAT THIS CASE YOU BELIEVE WILL MOVE MORE
8 QUICKLY BECAUSE YOU SAY IT HAS VERY LITTLE MERIT.

9 MR. BASSETT: I THINK THE ONE THING I CAN SAY
10 WITH SOME CERTAINTY, THE AVERAGE INTER PARTES
11 REEXAMINATION PENDENCY IS 36.5 MONTHS. WE ARE LESS THAN
12 A YEAR FROM THE FILING OF OUR REEXAMINATION PETITION AND
13 WE ARE NEAR THE END, SO THAT PIECE OF THE REEXAM, SO
14 THERE IS NO DOUBT THAT THIS REEXAM IS MOVING MUCH MORE
15 QUICKLY THAN THESE AVERAGE STATISTICS.

16 AND AGAIN, I WON'T PLAY ADVOCATE AND SUGGEST
17 WHY THAT IS, BUT WE THINK THERE IS A REASON FOR THAT, BUT
18 I AGREE THAT KIND OF DELAY WOULD TROUBLE ME AS WELL, BUT
19 THAT IS NOT WHAT WE HAVE. MOST LIKELY NO ONE CAN PREDICT
20 FOR SURE.

21 THE COURT: I AM NOT ASKING YOU TO BE A
22 FORTUNE TELLER. ALL RIGHT.

23 MR. RICHTER, IF YOU WANT TO HAVE A BITE AT THE
24 APPLE IN RESPONSE. IF NOT -- I AM NOT ENCOURAGING IT.

25 MR. RICHTER: ONE, I RECOGNIZE YOU ARE NOT

1 ENCOURAGING.

2 THE COURT: I UNDERSTAND NO ONE COULD RESIST
3 THE TEMPTATION, SO I THOUGHT YOU WOULD TAKE MY
4 INVITATION.

5 MR. RICHTER: ON THE 36 AND A HALF MONTHS
6 PENDENCY, AND THE FACT THAT THIS ONE HAS BEEN PENDING FOR
7 A YEAR, THE REASON YOU CAN'T PREDICT IS AGAIN PRECISION
8 SEEMS TO THINK THAT THE NEXT OFFICE ACTION WILL BE A
9 FINAL APPEALABLE ACTION NO MATTER WHAT. THAT IS NOT
10 TRUE. THERE CAN BE MULTIPLE REITERATIONS BEFORE YOU GET
11 TO APPEAL.

12 THE FINAL THING ON THE SUPPOSEDLY ONLY
13 EXPERIMENTAL USE OF MAMMALIAN CELLS AND CELL LINES AND
14 THAT ACCORDING TO PRECISION DIMINISHES IMPORTANCE IN THE
15 CASE. NOT TO CELLECTIS. THAT IS EXTREMELY IMPORTANT.
16 IN FACT, DISCOVERY HAS SHOWN PRECISION HIRED SOMEBODY
17 ESPECIALLY TO GEAR UP PROJECT X, A MAMMALIAN CELL
18 BIOLOGIST TO HANDLE THAT PROJECT. THOSE EXPERIMENTS ARE
19 VERY IMPORTANT. WE ARE ENTITLED TO AN INJUNCTION.

20 WHETHER OR NOT YOU HAVE COMMERCIALIZED
21 SOMETHING, YOU ARE CLEARLY TRYING TO DEVELOP A COMMERCIAL
22 PRODUCT FOR GENE THERAPY AND OTHER VERY EXCITING EDGE
23 CUTTING OF THESE ENGINEERED ENDONUCLEASES. THE FACT THAT
24 IT'S EXPERIMENTAL FORM, NOW WE WANT AN INJUNCTION. THAT
25 DOESN'T DIMINISH THE VALUE OF CLAIM 12. YOU WANT AN

1 INJUNCTION AGAINST EXPERIMENTS THAT ARE NOT BEING
2 MARKETED.

3 WE DON'T KNOW WHEN THEY WILL BE MARKETED. THE
4 PATENT EXPIRES IN 2012.

5 BUT THEY ARE ALREADY ENGAGED WITH OTHERS WHO
6 MAY HAVE USES FOR TECHNOLOGY, GETTING GRANTS TO DO
7 EXPERIMENTS.

8 THE COURT: I AM A SIMPLE COUNTRY GUY. A DAY
9 AFTER THE PATENT EXPIRES, THAT COULD PUT SOMETHING ON THE
10 MARKET THE DAY AFTER THE PATENT EXPIRES.

11 MR. RICHTER: WELL, IT DEPENDS, YOUR HONOR.
12 IF THEY STARTED MAKING IT THE DAY AFTER THE PATENT
13 EXPIRED, YES, BUT THE THINGS THAT THEY MAKE PRIOR TO
14 THAT, IMAGINE IF THEY WERE MAKING THINGS PRIOR TO THAT
15 BASED ON THE PATENT TECHNOLOGY, OBTAINING BUSINESS DEALS
16 WITH PEOPLE.

17 THE COURT: I UNDERSTAND THAT. I UNDERSTAND
18 THAT.

19 MR. RICHTER: THAT IS WHAT WE ARE PURSUING IN
20 THE DISCOVERY AND THAT IS WHAT WE INTEND TO DEMONSTRATE
21 AT TRIAL, THAT THERE IS A REASON THAT THE EXPERIMENTS ARE
22 BEING DONE. THEY STARTED A WHOLE NEW PROJECT JUST TO DO
23 THOSE EXPERIMENTS.

24 THE COURT: OKAY. ALL RIGHT. THANK YOU.

25 MR. BASSETT: YOUR HONOR, IF I CAN OFFER ONE

1 CITATION.

2 THE COURT: ONE QUICK CITATION.

3 MR. BASSETT: JUST A STATUTORY CITE TO ADDRESS
4 THE ISSUE ABOUT THE DELAY. THOSE STATISTICS AREN'T
5 LIMITED TO CASES, I DON'T BELIEVE, TO REEXAMS ALSO IN
6 LITIGATION, AND UNDER THE 35 U.S.C. SECTION 305, "A
7 REEXAM THAT IS BEING CONDUCTED ON PATENTS THAT ARE ALSO
8 IN LITIGATION, THAT REEXAMINATION, BY STATUTE, MUST MOVE
9 FORWARD WITH SPECIAL DISPATCH." (CLOSED QUOTE)

10 SO, AGAIN, THOSE STATISTICS DON'T NECESSARILY
11 APPLY TO THIS CASE.

12 THE COURT: I UNDERSTAND AND APPRECIATE THAT.

13 ALL RIGHT. I AM CONTENT WITH THE INFORMATION
14 WITH REGARD TO THE MOTION TO STAY. I DO WANT TO ALSO
15 HEAR ARGUMENTS ON THE MOTION TO COMPEL, MR. BASSETT OR
16 MS. FERRERA, WHOEVER IS ARGUING THAT.

17 MS. FERRERA, I WOULD BE GLAD TO HEAR FROM YOU.

18 MS. FERRERA: GOOD MORNING, YOUR HONOR.

19 I DO WANT TO PUT THESE MOTIONS IN CONTEXT. I
20 DO WANT TO GO BACK JUST BRIEFLY TO SOME OF THE EARLY
21 PROCEDURAL HISTORY IN THE CASE.

22 AS YOUR HONOR HEARD AND PROBABLY IS AWARE, ONE
23 OF THE FIRST THINGS THAT HAPPENED IN THIS CASE IS THAT
24 PRECISION FILED A MOTION TO DISMISS THE ACTION ON THE
25 GROUNDS THAT CELLECTIS, IT BELIEVED, DID NOT HAVE

1 STANDING TO PURSUE THE PATENT INFRINGEMENT CLAIMS BECAUSE
2 IT WAS JUST LICENSEE OF THE PATENTS AND NOT THE ACTUAL
3 OWNER OF THE PATENTS-IN-SUIT, AND PRECISION'S BELIEF WAS
4 THAT THE TWO PATENT HOLDERS WHO ARE TWO FRENCH
5 UNIVERSITIES OUGHT TO BE PLAINTIFFS IN THE CASE AS WELL
6 IN PART BECAUSE OF THE NEED TO GET DISCOVERY FROM THEM
7 AND THE DIFFICULTY OF DOING THAT IF THEY WERE NOT
8 PLAINTIFFS IN THE CASE.

9 AS YOUR HONOR KNOWS, JUDGE HOWARD ULTIMATELY
10 DID DENY THAT MOTION, BUT IN DOING SO, HE RELIED IN
11 SIGNIFICANT PART ON REPRESENTATIONS BY CELLECTIS AND BY
12 THE PATENT HOLDERS THAT THE PATENT HOLDERS WOULD
13 COOPERATE IN DISCOVERY.

14 NOW, CELLECTIS, IN ITS OPPOSITION, SAYS THAT
15 PRECISION IS JUST TRYING TO RELITIGATE THIS ISSUE AND
16 TRYING TO REVISIT THE MOTION TO DISMISS. THAT IS NOT
17 AT ALL WHAT WE ARE DOING. THE SIMPLE FACT, HOWEVER, IS
18 THAT THERE WERE REPRESENTATIONS MADE IN CONNECTION WITH
19 THE MOTION TO DISMISS THAT JUDGE HOWARD RELIED ON IN
20 DENYING THE MOTION TO DISMISS, AND SINCE DISCOVERY HAS
21 GOTTEN UNDER WAY, IT APPEARS THAT THOSE REPRESENTATIONS
22 WERE LESS THAN ACCURATE AND THAT, IN FACT, PRECISION HAS
23 BEEN THWARTED IN ITS ATTEMPTS TO OBTAIN DISCOVERY FROM
24 CELLECTIS ITSELF.

25 THERE ARE TWO PARTICULAR AREAS THAT THIS

1 MOTION IS DIRECTED TO. THE FIRST RELATES TO SOME
2 PRIVILEGED ISSUES, AND IN PARTICULAR THE ISSUE IS WHETHER
3 OR NOT COMMUNICATIONS BETWEEN CELLECTIS OR BETWEEN PATENT
4 HOLDERS OR THE INVENTORS ON THE ONE HAND AND
5 COMMUNICATIONS BETWEEN FOREIGN PATENT AGENTS OR FOREIGN
6 IN-HOUSE COUNSEL ARE PRIVILEGED.

7 PRECISION'S POSITION IS THAT THERE ARE
8 COMMUNICATIONS THAT ARE NOT PRIVILEGED; HOWEVER,
9 CELLECTIS WITHHELD A LARGE NUMBER OF DOCUMENTS ON THE
10 BASIS OF CLAIMED PRIVILEGE WITH RESPECT TO THOSE
11 COMMUNICATIONS EVEN THOUGH THERE IS NO QUESTION THAT
12 THOSE INDIVIDUALS ARE NOT A MEMBER OF ANY BAR AND
13 CERTAINLY NOT A MEMBER OF ANY U.S. BAR, AND NOT A MEMBER
14 OF THE BAR EVEN IN FRANCE, WHERE THEY ARE LOCATED, THAT
15 WOULD RENDER THOSE COMMUNICATIONS PRIVILEGED.

16 THE SECOND AREA THAT I WOULD LIKE TO TALK
17 ABOUT ALSO ARE DOCUMENTS SPECIFICALLY IN THE POSSESSION,
18 CUSTODY OR CONTROL OF THE TWO PATENT HOLDERS, INSTITUTE
19 PASTEUR AND UNIVERSITE -- I DON'T KNOW HOW TO SPEAK
20 FRENCH -- UNIVERSITE PIERRE ET MARIE CURIE, I BELIEVE, IS
21 THE NAME OF THE OTHER INSTITUTE.

22 PRECISION MADE NUMEROUS REQUESTS FOR THE
23 PATENT HOLDERS FOR THE DOCUMENTS RELATING TO THE
24 PATENTS-IN-SUIT AND RELATING TO THE DOCUMENTS OF THOSE
25 PATENTS. IT MADE THOSE REQUESTS THROUGH CELLECTIS

1 BECAUSE OF IT'S INABILITY TO SERVE FORMAL DISCOVERY
2 REQUESTS ON THEM. AND IN SPITE OF THOSE REQUESTS AND IN
3 SPITE OF THEIR PROMISES OF COOPERATION, ONLY A HANDFUL OF
4 DOCUMENTS HAVE BEEN PRODUCED.

5 I WOULD LIKE TO START WITH THE PRIVILEGE ISSUE
6 BECAUSE I THINK THAT INFORMS, IN PART, THE OTHER ISSUE AS
7 WELL. AS I INDICATED, CELLECTIS HAS ASSERTED A PRIVILEGE
8 WITH RESPECT TO A LARGE NUMBER OF COMMUNICATIONS BETWEEN
9 FOREIGN PATENT AGENTS, NOT PATENT AGENTS, NOT ATTORNEYS,
10 BUT IN-HOUSE COUNSEL AT CELLECTIS OR INSTITUT PASTEUR AND
11 CLAIMED THAT THOSE DOCUMENTS ARE PROPERLY WITHHELD. IN
12 FACT, IT PROVIDED A PRIVILEGED LOG THAT CONTAINS ALMOST
13 3,000 ENTRIES, AND ALTHOUGH UNDOUBTEDLY SOME OF THE
14 DOCUMENTS ARE PRIVILEGED, A LARGE NUMBER OF THEM APPEAR
15 NOT TO BE PRIVILEGED BECAUSE THEY DO NOT INVOLVE A U.S.
16 ATTORNEY OR ANOTHER INDIVIDUAL WHO WOULD BE SUFFICIENT TO
17 CREATE A PRIVILEGE.

18 NOW, PRECISION RAISED CONCERNs ABOUT THE
19 PROPRIETY OF CELLECTIS' PRIVILEGED DESIGNATIONS IN AUGUST
20 OF LAST YEAR. THERE WAS A SERIES OF CORRESPONDENCE BACK
21 AND FORTH BETWEEN THE PARTIES OVER THE COURSE OF THE NEXT
22 TWO MONTHS OR SO WHERE WE WERE ATTEMPTING TO NARROW THE
23 ISSUES AND ATTEMPTING TO REACH SOME RESOLUTION OR
24 AGREEMENT ON THOSE ISSUES.

25 ULTIMATELY, CELLECTIS AGREED TO GIVE WHAT IT

1 DESCRIBES IN AN ATTORNEY LEGEND WHICH IDENTIFIED ROLES OR
2 TITLES OF THE INDIVIDUALS WHO WERE ON ITS PRIVILEGE LOG,
3 AND BASED ON THAT LEGEND, IT APPEARS AT LEAST SEVEN OF
4 THE INDIVIDUALS ON WHOM CELLECTIS BASES ITS PRIVILEGED
5 DETERMINATIONS ARE EITHER FOREIGN PATENT AGENTS OR
6 IN-HOUSE COUNSEL FOR CELLECTIS OR FOR INSTITUTE PASTEUR.

7 BASED ON RECEIVING THIS INFORMATION AND BASED
8 ON REVIEW OF THIS, CELLECTIS' CONTINUED ASSERTION OF
9 PRIVILEGE RELATING TO THOSE COMMUNICATIONS, PRECISION
10 FILED THIS MOTION IN DECEMBER OF LAST YEAR.

11 FUNDAMENTAL TO THIS ISSUE IS THE PRINCIPLE
12 THAT FOR AN ATTORNEY/CLIENT PRIVILEGE TO EXIST, ONE OF
13 THE INDIVIDUALS ON THE COMMUNICATION MUST BE A MEMBER OF
14 THE BAR OF THE COURT. THAT IS BLACK LETTER LAW. THERE
15 IS NO DISPUTE ABOUT THAT. FOREIGN PATENT AGENTS ARE
16 TYPICALLY NOT ATTORNEYS, YET ALONE MEMBERS OF A BAR OF
17 COURTS, AND BASED UPON THAT, JUDGE HOWARD RULED IN THE
18 BURROUGHS WELLCOME CASE THAT THE STANDING RULE IN THE
19 CIRCUIT IS THAT COMMUNICATIONS WITH FOREIGN PATENT AGENTS
20 ARE NOT SUBJECT TO AN ATTORNEY/CLIENT PRIVILEGE IN THE
21 UNITED STATES, AND THAT THE CITE FOR THAT IS 143 F.R.D.
22 611 AT PAGE 616.

23 NOW, THERE ARE EXCEPTIONS TO THE RULE SUCH AS
24 WHERE THE PATENT AGENT IS ACTING AT THE DIRECTION OR
25 UNDER THE CONTROL OF THE U.S. ATTORNEY, BUT IT IS

1 CELLECTIS THAT BEARS THE BURDEN OF DEMONSTRATING THAT
2 THAT IS THE CASE HERE AND IT HAS NOT MADE ANY ATTEMPTS TO
3 DO THAT.

4 THE LAW IS ALSO CLEAR THAT BECAUSE UNDER
5 FRENCH LAW, IN-HOUSE COUNSEL, IN-HOUSE COUNSEL IN FRANCE,
6 ARE NOT PERMITTED TO BECOME MEMBERS OF THE BAR OF THE
7 COURT. COMMUNICATIONS WITH SUCH IN-HOUSE COUNSEL ARE
8 ALSO NOT PRIVILEGED AND THAT RULE WAS DESCRIBED AND THE
9 CASE LAW RELATING TO THAT RULE WAS DESCRIBED IN THE LOUIS
10 VUITTON MALLETIER CASE FROM THE SOUTHERN DISTRICT OF NEW
11 YORK, 2006 U.S. -- I THINK IT'S A LEXIS 87096. AND
12 CELLECTIS HAS NOT CITED ANY CONTRARY AUTHORITY TO THAT
13 POINT.

14 NOW, CELLECTIS ATTEMPTS TO ARGUE THAT THE
15 DOCUMENTS AT ISSUE ARE PRIVILEGED FOR TWO REASONS.
16 FIRST, IT SAYS THAT THE ATTORNEY/CLIENT PRIVILEGE DOES
17 EXTEND TO FOREIGN PATENT AGENTS. AND SECOND, IT ARGUES
18 THAT THE DOCUMENTS, EVEN IF THAT IS NOT TRUE, THAT THE
19 DOCUMENTS ARE PRIVILEGED BECAUSE THEY WERE COMMUNICATIONS
20 WITH U.S. COUNSEL. NEITHER OF THOSE ARGUMENTS HAS MERIT.

21 AS TO THE FIRST ARGUMENT REGARDING THE
22 APPLICATION OF PRIVILEGED OR FOREIGN PATENT, CELLECTIS
23 HAS THE LAW WRONG ON THAT. CELLECTIS CITES THE DUPLAN
24 CASE IN SUPPORT OF ITS ARGUMENT, BUT IN FACT THAT CASE
25 EXPLICITLY REJECTED THE ARGUMENT THAT CELLECTIS IS TRYING

1 TO MAKE HERE THAT BECAUSE COMMUNICATIONS WITH PATENT
2 AGENTS ARE PROTECTED UNDER FRENCH LAW, THEY SHOULD ALSO
3 BE PRIVILEGED IN THE UNITED STATES, AND IN FACT THE
4 DISTRICT COURT IN THAT CASE REJECTED THAT HOLDING AND
5 SAID THAT IT WOULD (QUOTE) "ADOPT THE RULE THAT NO
6 COMMUNICATIONS FROM PATENT AGENTS, WHETHER AMERICAN OR
7 FOREIGN, ARE SUBJECT TO AN ATTORNEY/CLIENT PRIVILEGE IN
8 THE UNITED STATES." AND THAT WAS THE HOLDING THAT JUDGE
9 HOWARD RELIED UPON IN THE BURROUGHS WELLCOME CASE.

10 IN ARGUING TO THE CONTRARY, CELLECTIS
11 ERRONEOUSLY RELIES ON A PORTION OF THE OPINION WHICH
12 RELATES TO THE APPLICATION OF PRIVILEGE WHEN PROSECUTING
13 FRENCH APPLICATIONS AND ACTING AS PATENT COUNSEL IN
14 FRANCE. HOWEVER, AS CELLECTIS POINTS OUT IN ITS
15 OPPOSITION BRIEF, THERE ARE NO FRENCH PATENT APPLICATIONS
16 AT ISSUE. WE ARE TALKING ABOUT U.S. PATENT APPLICATIONS
17 AND U. S. PROSECUTION, AND UNDER THE DUPLAN CASE AND
18 UNDER THE BURROUGHS WELLCOME CASE, THOSE COMMUNICATIONS
19 ARE NOT PRIVILEGED.

20 AS TO THE SECOND ARGUMENT THAT U.S. COUNSEL
21 WAS INVOLVED IN THE COMMUNICATIONS, THAT ALONE WOULD NOT
22 NECESSARILY RENDER THE COMMUNICATIONS PRIVILEGED. FOR
23 EXAMPLE, AS JUDGE HOWARD EXPLAINED IN THE BURROUGHS
24 WELLCOME CASE, IF THE U.S. ATTORNEY IS MERELY SERVING AS
25 CONDUIT, THEN THE COMMUNICATION MAY NOT BE PRIVILEGED.

1 THE PROBLEM IS THAT BASED ON THE DESCRIPTIONS
2 AND CELLECTIS' PRIVILEGED LOG, WE CAN'T TELL ONE WAY OR
3 THE OTHER WHAT ROLE THE FRENCH ATTORNEYS OR FRENCH PATENT
4 AGENTS ARE PLAYING AND WHAT ROLE THE U. S. PATENT
5 ATTORNEYS ARE PLAYING.

6 IT IS CELLECTIS' BURDEN TO SHOW THAT THE
7 PRIVILEGE APPLIES AND CELLECTIS' BURDEN TO SHOW THAT THE
8 COMMUNICATIONS OUGHT TO BE PRIVILEGED BECAUSE THE U.S.
9 PATENT ATTORNEY IS PLAYING A SUBSTANTIVE ROLE IN THE
10 COMMUNICATIONS. IT HAS FAILED TO DO THAT HERE AND THAT
11 WEIGHS IN FAVOR OF DISCLOSURE.

12 IN ADDITION, BASED ON THE PRIVILEGE LOG
13 ENTRIES, THERE ARE A LARGE NUMBER OF DOCUMENTS THAT DO
14 NOT APPEAR TO INVOLVE U.S. COUNSEL AT ALL, AND THEREFORE
15 SHOULD BE PRODUCED. AND I HAVE A COPY OF CELLECTIS'
16 PRIVILEGE LOG AND CAN POINT OUT SOME EXAMPLES OF THAT
17 THAT WOULD BE HELPFUL TO THE COURT.

18 THE COURT: THANK YOU. THAT WAS ONE OF MY
19 QUESTIONS AS TO THE SPECIFIC DOCUMENTS THAT ARE AT ISSUE.

20 MR. FERRERA: THIS IS A REVISED PRIVILEGE LOG
21 THAT CELLECTIS SENT AFTER DETERMINING SOME OF THE
22 COMMUNICATIONS IT HAS PREVIOUSLY IDENTIFIED WERE
23 PRIVILEGED BUT, IN FACT, WERE NOT. BUT NOTWITHSTANDING
24 THAT, WE BELIEVE THERE ARE A NUMBER OF DOCUMENTS THAT --
25 A LARGE NUMBER OF DOCUMENTS THAT ARE NOT PROTECTED BY THE

1 | PRIVILEGE.

2 AND AS I NOTED, THERE ARE ALMOST 3,000 ENTRIES
3 ON HERE. I CAN'T GIVE YOU AN INCLUSIVE LIST OF ALL OF
4 THE ONES THAT WE SAY ARE NOT PROVIDED BECAUSE THERE ARE
5 SO MANY, BUT I CAN POINT OUT EXAMPLES.

6 FOR EXAMPLE, IF YOU TURN TO PAGE 2 OF THE LOG,
7 ENTRY NUMBERS 22 THROUGH 25, FOR EXAMPLE, INVOLVE
8 SOMEBODY BY THE NAME OF BRUNO BRISSON, ISABELLE BRESSAC,
9 ANDRE CHOULIKA AND FREDERIC PAQUES.

10 WE UNDERSTAND PRIVILEGE BASED UPON MS.
11 BRESSAC, HOWEVER OUR UNDERSTANDING IS MS. BRISSON IS A
12 LICENSED ATTORNEY FOR CELLECTIS, SO SHE IS IN-HOUSE
13 COUNSEL AT CELLECTIS, AND BASED ON THE CASE LAW, SHE
14 WOULD NOT BE SUFFICIENT TO CREATE A PRIVILEGE. THERE
15 DOESN'T APPEAR TO BE ANY U.S. ATTORNEY ON THIS PRIVILEGED
16 COMMUNICATION.

17 SIMPLY, IF YOU LOOK AT ENTRIES 51 AND 52,
18 AGAIN, THERE IS COMMUNICATION BETWEEN ISABELLE BRESSAC
19 AND ANDRE CHOULIKA. SO, AGAIN, THERE APPEARS TO BE NO
20 U. S. ATTORNEY LICENSED ON THOSE DOCUMENTS.

21 ANOTHER EXAMPLE IS ENTRY 101 THROUGH 104. MR.
22 SOURDIVE IS AN ENGINEER, A SCIENTIST. MS. BRESSAC AGAIN
23 IS ON THE DOCUMENT. SAME THING WITH ENTRIES 102 AND 104
24 OR 103 AND 104. I COULD GO ON. THERE ARE MANY, MANY
25 OTHER EXAMPLES, BUT THESE ARE JUST A HANDFUL. THERE

1 DOESN'T APPEAR TO BE ANY U.S. ATTORNEY THAT WOULD SUFFICE
2 TO CREATE A PRIVILEGE.

3 SO, IN SHORT, YOUR HONOR, WITH RESPECT TO THIS
4 ISSUE OF PRIVILEGE, CELLECTIS' CLAIM BASED ON
5 COMMUNICATION WITH FOREIGN PATENT AGENTS OR FOREIGN
6 IN-HOUSE COUNSEL IS IMPROPER AND WE BELIEVE THOSE
7 DOCUMENTS SHOULD BE PRODUCED.

8 WITH RESPECT TO THE SECOND ISSUE WHICH IS THE
9 PATENT HOLDERS FAILURE TO PRODUCE DOCUMENTS REQUESTED BY
10 PRECISION RELATING TO THE PATENTS-IN-SUIT AND RELATING TO
11 THE PROSECUTION, PRECISION, OF COURSE, IS HAMSTRUNG BY
12 THE FACT THAT NEITHER INSTITUT PASTEUR NOR THE OTHER
13 ENTITY, UPMC, AS WE BELIEVE, ABBREVIATING, ARE SUBJECT TO
14 THE JURISDICTION OF THE COURT AND IT'S IMPOSSIBLE FOR
15 PRECISION TO MAKE ANY FORMAL DISCOVERY REQUESTS TO THEM,
16 AND THAT'S ONE OF THE REASONS WHY PRECISION FILED THIS
17 MOTION TO DISMISS THE ACTION EARLIER.

18 HOWEVER, AT THAT TIME CELLECTIS REPRESENTED TO
19 THE COURT IN ITS OPPOSITION THAT THE PATENT HOLDERS WOULD
20 COOPERATE WITH DISCOVERY AND THE COURT RELIED ON THAT IN
21 DENYING THE MOTION TO DISMISS.

22 SINCE THAT TIME, PRECISION HAS PROCEEDED AND
23 ATTEMPTED TO OBTAIN DOCUMENTS FROM THOSE ENTITIES BY
24 SENDING THE REQUESTS TO CELLECTIS EITHER IN
25 CORRESPONDENCE OR SENDING ACTUAL REQUESTS TO THEM AND HAS

1 BEEN ATTEMPTING TO GET THE DOCUMENTS THROUGH CELLECTIS
2 FROM THE PATENT HOLDERS, AND PRECISION'S UNDERSTANDING,
3 BASED ON THE REPRESENTATIONS MADE IN CELLECTIS' FILINGS
4 WITH THE COURT, THAT THE PATENT HOLDERS WOULD RESPOND TO
5 THE REQUESTS AS IF THEY WERE PARTIES TO THE ACTION.

6 HOWEVER, AS IT'S NOTED EARLIER, ONLY A HANDFUL
7 OF DOCUMENTS HAVE BEEN PRODUCED. I THINK IN TOTAL WE
8 HAVE RECEIVED A NUMBER OF LAB NOTEBOOKS, TWO DOCTORAL
9 THESES, AND 21 PAGES OF LOOSE LAB NOTES. THAT IS IT.
10 THAT IS THE ENTIRETY OF THE PRODUCTION FROM INSTITUT
11 PASTEUR AND FROM UPMC. THEY HAVE REFUSED TO PRODUCE ANY
12 OTHER DOCUMENTS RELATING TO THE CONSTRUCTION OR THE
13 INVENTION DISCLOSURE OR INTERNAL COMMUNICATIONS BETWEEN
14 THE INVENTORS AND REFUSED TO PRODUCE DOCUMENTS WHERE SUCH
15 COMMUNICATIONS BETWEEN PASTEUR AND UPMC OR BETWEEN
16 PASTEUR AND INVENTORS OR BETWEEN CELLECTIS AND PASTEUR.

17 THEY HAVE FAILED TO PRODUCE ANY DOCUMENTS
18 RELATING TO THE FIRST PUBLIC USE OR PUBLIC DISCLOSURE OF
19 THE INVENTIONS WHICH IS SOMETHING RELATED TO THE VALIDITY
20 OF THE PATENTS, AND FAILED TO PRODUCE ANY OTHER DOCUMENTS
21 RELATING TO THE VALIDITY OR ENFORCEABILITY SUCH AS PRIOR
22 ART AND INVENTION OF THE PRIOR ART.

23 THERE IS NO QUESTION THAT ALL OF THIS
24 INFORMATION IS RELEVANT TO THE VALIDITY AND
25 ENFORCEABILITY OF THE PATENTS, AND I DON'T UNDERSTAND

1 CELLECTIS TO BE DISPUTING THAT. THERE HAS BEEN NO
2 SUGGESTION THAT THE PATENT HOLDERS DON'T HAVE THESE
3 DOCUMENTS. THEY HAVE SIMPLY CHOSE NOT TO PRODUCE THEM,
4 AND THIS IS PARTICULARLY PROBLEMATIC AS IT RELATES TO
5 PRECISION'S INEQUITABLE PRIOR CLAIMS. IT'S UNDISPUTED
6 THAT THE PRIOR ART REFERENCES THAT ARE THE SUBJECT OF
7 PRECISION'S INEQUITABLE CONDUCT COUNTERCLAIM WERE KNOWN
8 TO THE INVENTORS, AND IN PARTICULAR TO BERNARD DUJON WHO
9 IS THE LEAD INVENTOR ON BOTH PATENTS.

10 WHEN WE DEPOSED MR. DUJON, HE SAID HE GAVE ALL
11 THE INFORMATION TO THE IN-HOUSE ATTORNEYS OR PATENT
12 AGENTS AT PASTEUR. BUT BECAUSE WE HAVE NOT RECEIVED ANY
13 OF THEIR INTERNAL COMMUNICATIONS, WE HAVE NOT BEEN ABLE
14 TO VERIFY THIS. WE HAVE NOT BEEN ABLE TO DETERMINE WHO
15 AT PASTEUR HE GAVE THE INFORMATION TO. WE HAVE NOT BEEN
16 ABLE TO DETERMINE WHAT THEY DID WITH THE INFORMATION ONCE
17 THEY RECEIVED IT OR WHY IT WASN'T DISCLOSED PROPERLY TO
18 THE PATENT OFFICE AS WE CLAIM IN THE COUNTERCLAIM.

19 CELLECTIS' PRIMARY RESPONSE TO THIS ARGUMENT
20 IS IT'S OUTSIDE PATENT COUNSEL. THE LAW FIRM PROSECUTING
21 THE PATENT HAS PRODUCED DOCUMENTS, HAS PRODUCED ITS FILES
22 RELATING TO THE PROSECUTION OF THE PATENT, BUT THAT
23 MISSES THE POINT. THERE IS NO QUESTION THAT FINNEGAN,
24 HENDERSON, THE LAW FIRM THAT PROSECUTED THE PATENT,
25 WOULDN'T HAVE ACCESS TO PASTEUR'S INTERNAL FILES OR

1 CELLECTIS' INTERNAL FILES, AND EVEN WITH RESPECT TO
2 COMMUNICATIONS BETWEEN THOSE ENTITIES AND FINNEGAN.
3 THERE IS NO GUARANTEE THAT FINNEGAN'S FILES ARE COMPLETE.
4 AND, IN FACT, BASED ON THE INFORMATION WE HAVE RECEIVED,
5 IT SEEMS CERTAIN THAT THEY ARE NOT COMPLETE.

6 SO THE MERE FACT THAT IT'S SOME OTHER ENTITY
7 THAT PRODUCED DOCUMENTS DOESN'T MEAN PASTEUR OR CELLECTIS
8 SHOULD NOT HAVE TO PRODUCE DOCUMENTS THAT THEY HAVE THAT
9 ARE NOT DUPLICATIVE OF THE ONES PRODUCED.

10 THE COURT: NOT TO INTERRUPT YOU AGAIN, BUT
11 WHAT CONTROL DO THEY HAVE OVER THOSE DOCUMENTS?

12 MS. FERRERA: WELL, WITH RESPECT TO CELLECTIS,
13 CELLECTIS ISN'T A PARTY TO THE LAWSUIT, SO THIS
14 IMPLICATES BOTH DOCUMENTS IN THE POSSESSION AND CUSTODY
15 OF THE PLAINTIFF, A PARTY TO THE LAWSUIT, AS WELL AS
16 THOSE THAT MAY BE IN THE POSSESSION OF THE PATENT HOLDERS
17 WHO ARE NOT PARTIES TO THE LAWSUIT.

18 AS TO THOSE DOCUMENTS, YOUR HONOR, WE
19 RECOGNIZE THAT THIS IS A PROBLEM AND THIS WAS WHY WE
20 FILED THE MOTION TO DISMISS. I THINK WHAT WE ARE LOOKING
21 FOR, YOUR HONOR, IS AN ORDER FROM THE COURT THAT WOULD
22 MAKE CLEAR THAT JUST BECAUSE FINNEGAN, HENDERSON PRODUCED
23 SOME DOCUMENTS DOESN'T NECESSARILY RELEASE THE PATENT
24 HOLDERS OR ANYONE ELSE FROM PRODUCING DOCUMENTS IN THEIR
25 FILES.

1 SECONDLY, WE WOULD LIKE TO GET THE PRIVILEGE
2 ISSUE RESOLVED SO TO THE EXTENT THAT THEY ARE WITHHOLDING
3 THE DOCUMENTS ON THE BASIS OF THE PRIVILEGE ISSUE, WE
4 WOULD WANT IT MADE CLEAR THAT THAT IS AN IMPROPER BASIS
5 FOR WITHHOLDING THE DOCUMENTS. AND IF THE PATENT HOLDERS
6 STILL CHOSE TO IGNORE THE REQUESTS AND STILL CHOSE TO NOT
7 PRODUCE THE DOCUMENTS, I THINK WHAT WE WOULD END UP WITH
8 WHEN WE GET TO TRIAL, WE THINK IT WOULD BE APPROPRIATE AT
9 THAT TIME FOR THERE TO BE AN INSTRUCTION THAT SOME KIND
10 OF ADVERSE INFERENCE IS APPROPRIATE THAT THEY WERE
11 REQUESTED TO PRODUCE DOCUMENTS THAT WOULD EVIDENCE THAT
12 THEY DIDN'T HAVE THE APPROPRIATE INTENT OR THAT THEY
13 DIDN'T -- THEY TOOK APPROPRIATE ACTIONS AND THE FACT THAT
14 THEY FAILED TO PRODUCE THEM IS SOMETHING THAT THE JURY OR
15 THE FACT FINDER MAY TAKE INTO ACCOUNT.

16 IN SHORT, YOUR HONOR, WHAT PRECISION IS
17 LOOKING FOR HERE IS JUST THEY WANT TO BE ON THE LEVEL
18 PLAYING FIELD. IT'S NOT APPROPRIATE FOR CELLECTIS AND
19 THE PATENT HOLDERS TO BE ABLE TO PICK AND CHOOSE WHAT
20 DISCOVERY THEY WANT TO PROVIDE JUST BECAUSE IT'S
21 CONVENIENT OR HELPFUL TO THEM, AND IGNORE DISCOVERY
22 REQUESTS THAT ARE INCONVENIENT OR UNHELPFUL TO THEM.

23 THE COURT: ALL RIGHT. THANK YOU. ALL RIGHT.
24 MR. RICHTER.

25 MR. RICHTER: I AM BACK.

1 THE COURT: YOU DON'T HAVE ANY ASSISTANCE FROM
2 YOUR TEAMMATES, OR AT LEAST YOU ARE GOING THROUGH THE
3 LINES.

4 MR. RICHTER: THANK YOU. IF IT'S OKAY WITH
5 THE COURT, WE WILL CONTINUE WITH OUR PRESENTATION.

6 THE COURT: THAT IS VERY HELPFUL. AS A MATTER
7 OF FACT, I WOULD LIKE TO GET A COPY OF THAT TO THE EXTENT
8 POSSIBLE. ALL RIGHT, MR. RICHTER. DRIVE ON.

9 MR. RICHTER: THANK YOU, YOUR HONOR. I WOULD
10 START WITH, I THINK, SLIDE 19, PLEASE. THE FIRST POINT
11 IS CELLECTIS HAS NOT IMPROPERLY WITHHELD ANY DOCUMENTS
12 HERE. NOT SURPRISINGLY, I DISAGREE, AGAIN, WITH
13 PRECISION, BUT JUST GOING TO THE MOTION TO DISMISS, THAT
14 HEARING WAS HELD ON NOVEMBER 13, 2009. I DON'T RECALL
15 ANY MENTION OF A MOTION TO COMPEL AT THAT HEARING. AND
16 WE CERTAINLY DID NOT MISREPRESENT ANYTHING DURING THE
17 HEARING. AND IN FACT, THE DECISION OF JUDGE HOWARD WITH
18 REGARD TO CELLECTIS' STANDING TO SUE ON ITS OWN WAS BASED
19 ON THE FACT THAT CELLECTIS, AS THE EXCLUSIVE LICENSEE
20 UNDER THE TERMS OF ITS LICENSE, HAS ALL SUBSTANTIAL
21 RIGHTS NECESSARY TO BRING A LAWSUIT ON ITS OWN WITHOUT
22 PASTEUR, AND THAT WAS THE BASIS OF THE DECISION.

23 AND JUDGE HOWARD INVITED, IN HIS ORDER, THE
24 PARTIES TO RAISE ANY ISSUE THAT THEY THOUGHT HAD SOME
25 BEARING ON HIS DECISION ON THE MOTION TO DISMISS DURING

1 THE HEARING, AND THE MOTION TO COMPEL, BY MY
2 RECOLLECTION, WAS NOT RAISED AT THAT TIME.

3 AND FRANKLY, YOUR HONOR, WE FEEL A LITTLE BIT
4 AMBUSHED BY THE PRESENTATION THAT WAS JUST MADE IN THE
5 SENSE THAT THE DOCUMENTS IDENTIFIED ON OUR PRIVILEGED LOG
6 I DON'T BELIEVE WERE EVER IDENTIFIED TO US DURING OUR
7 MEET AND CONFER, AND WE DON'T BELIEVE THAT THEIR MOTION
8 EVEN COMPLIES WITH THE LOCAL RULE 7.1(C) WHICH REQUIRES A
9 DEGREE OF SPECIFICITY WITH REGARD TO THE DOCUMENTS AT
10 HAND AND THE ISSUES AT HAND.

11 AND I KNOW MS. FERRERA CITED THE BURROUGHS
12 WELLCOME CASE FROM 1992. I READ THAT CASE, AND IN THAT
13 CASE JUDGE HOWARD WAS SPECIFICALLY ADDRESSING IN DETAIL
14 DOCUMENTS IDENTIFIED BY A NUMBER ON A PRIVILEGE LOG AND
15 WE DIDN'T HAVE THAT OPPORTUNITY, AND WE DIDN'T GET THE
16 IDENTIFICATION JUST GIVEN BY MS. FERRERA. SO I DON'T
17 THINK THAT IT'S EVEN RIPE.

18 IF YOU WOULD TURN, PLEASE, TO SLIDE 21, THIS
19 SHOWS THE TIMELINE FOR THE MOTION TO COMPEL. YOU KNOW,
20 WE LONG AGO, IN SEPTEMBER 2008, SERVED OUR OBJECTIONS TO
21 THE OVERBREADTH OF THE DOCUMENT REQUEST. THAT WAS IN
22 SEPTEMBER 2008.

23 FROM MAY TO AUGUST 2009, THE PARTIES DISCUSSED
24 RELEVANT AND PRIVILEGED ISSUES AS TO FOREIGN PATENTS,
25 PROSECUTION, AND OTHER PROSECUTION.

1 IN AUGUST 2009, WE BELIEVE WE REACHED AN
2 AGREEMENT WITH PRECISION THAT WE WOULD GO TO YOU TO
3 ADDRESS THIS ISSUE BECAUSE IT WAS AN ISSUE AND OUR JOINT
4 RECOLLECTION WAS THE LAST TIME WE WERE ON THE PHONE WITH
5 YOUR HONOR, YOU MENTIONED IF THERE WERE ANY DISCOVERY
6 ISSUES THAT THE PARTIES BELIEVED THAT YOU COULD HELP US
7 WITH, THAT YOU WERE AVAILABLE BY PHONE AND WE EMBRACED
8 THAT PROCEDURE.

9 WE DID SUGGEST THAT GIVEN THE COMPLEXITY OF
10 THE ISSUES AND THE LAW THAT YOU MIGHT WANT TO SEE SOME
11 WRITTEN SUBMISSIONS BECAUSE WE DIDN'T THINK YOU WOULD
12 DECIDE IT OVER THE PHONE. WE WERE -- WE REITERATED THAT
13 SUGGESTION IN SEPTEMBER. PRECISION DIDN'T RESPOND.

14 AND THEN ON OCTOBER, 20 2009, WE GOT A LETTER
15 DEMANDING THAT WE REVISIT OUR ENTIRE PRIVILEGE LOG. THEY
16 IDENTIFIED 26 DOCUMENTS AND THAT WAS IT, BUT I DON'T
17 BELIEVE ANY OF THE DOCUMENTS WERE THE DOCUMENTS POINTED
18 OUT BY MS. FERRERA.

19 ON OCTOBER 23, WE COULDN'T REVISIT THE
20 ENTIRETY OF THE PRIVILEGE LOG IN TWO DAYS. I THINK WE
21 WERE AT THE DEPOSITION OF DR. SERLACHA, AND WE EXPLAINED
22 WE CAN'T DO IT IN TWO DAYS, BUT WE ARE HAPPY TO TALK TO
23 YOU.

24 ON OCTOBER 23, WE GOT A LETTER SAYING THEY
25 WANTED TO MOVE TO COMPEL, AND THEN THE HEARING ON THE

1 MOTION TO DISMISS, THAT WAS NOVEMBER 13, 2009.

2 NO MOTION OF A MOTION TO COMPEL BY MY
3 RECOLLECTION. THEN THE COURT DECIDES THAT PASTEUR DOES
4 NOT HAVE TO BE A PARTY TO THE LITIGATION.

5 THEN ON DECEMBER 31, 2009, WHILE I WAS GETTING
6 READY FOR THE NEW YEAR'S EVE PARTY, I NOTICED AN ACTIVITY
7 IN THE CASE AND ACTUALLY I THINK IT WAS THE END OF THE
8 NEW YEAR'S PARTY BECAUSE I THINK IT WAS FILED AT 11:59,
9 BY MR. MORRIS. MAYBE HE WAS AT HIS OWN PARTY.

10 SO I GOT THAT, AND I WAS LIKE WHAT IS THIS?
11 AND WE THOUGHT THAT ISSUE HAD SUBSIDED, BUT NO HEARING
12 WAS HELD ON THE MOTION TO COMPEL, AND THAT IS WHERE WE
13 ARE NOW.

14 AND GOING ON WITH THE TIMELINE, I WOULD NOTE
15 THAT, YOU KNOW, THEY HAVE MADE A LOT DURING TODAY'S
16 HEARING IN BOTH OF THESE MOTIONS ABOUT SUPPOSEDLY
17 INEQUITABLE CONDUCT BY THE PATENT HOLDERS AND BY
18 CELLECTIS.

19 AND THE DOCUMENTS THAT THEY ARE SEEKING IN
20 THEIR MOTION TO COMPEL GO BACK TO 1992 WHEN THIS FILING
21 WAS MADE. THE ORIGINAL FILING FOR THESE PATENTS WAS MADE
22 IN 1992. IT GREW AS A TREE INTO 13 DIFFERENT PATENTS
23 NOW.

24 IN THE MOTION TO COMPEL, THEY ARE SAYING THEY
25 WANT EVERYTHING GOING BACK TO 1992. BUT WHEN IT WAS

1 REVEALED RECENTLY THAT, IN FACT, A WILMERHALE PARTNER
2 WHILE EMPLOYED AT FINNEGAN AND HENDERSON WORKED ON
3 APPLICATIONS THAT LEAD TO THE PATENTS-IN-SUIT IN MID-1990
4 OR IN THE MID-90'S AND AROUND 1995 OR 1996, WHEN THAT
5 CAME TO LIGHT AND WE MOVED TO DISCOVERY, WILMERHALE,
6 BECAUSE IN OUR VIEW IT'S NOT PROPER TO ALLEGE INEQUITABLE
7 CONDUCT EVEN THOUGH THEY -- WHICH NOBODY DID ANYTHING
8 IMPROPER, INCLUDING THEIR PARTNER WHEN SHE WAS AT
9 FINNEGAN -- BUT IF YOU WERE GOING TO MAKE THAT
10 ALLEGATION, YOU SHOULDN'T BE ABLE TO MAKE IT ON BEHALF OF
11 PRECISION WHEN ONE OF THE PARTNERS WAS DAMAGED IN THE
12 CONDUCT YOU SAY WAS INEQUITABLE.

13 SO WHEN WE BROUGHT THE MOTION, NOW THEY SAY
14 NOTHING BAD -- SOMETHING BAD HAPPENED, BUT NOTHING BAD
15 HAPPENED UNTIL AFTER SHE LEFT.

16 SO NOW THE EARLIEST ANYTHING BAD HAPPENED WAS
17 1998 OR JANUARY OF 2000. THAT IS THE ARGUMENT IN DEFENSE
18 TO THE MOTION TO DISQUALIFY AT THE SAME TIME THAT THE
19 MOTION TO COMPEL THEY ARE SEEKING DOCUMENTS GOING BACK TO
20 1992 BECAUSE AS MS. FERRERA SAID, DR. DUJON TESTIFIED
21 THAT HE HANDED OVER THE PRIOR ART IN 1992. WHY IS THAT
22 RELEVANT IF NOTHING BAD HAPPENED UNTIL 1998 AT THE
23 EARLIEST? I THINK THOSE ARE INCONSISTENT IN THE
24 ARGUMENT.

25 THE OTHER THING I WOULD SAY IS THAT GOING BACK

1 TO SLIDE 19, PLEASE, IT HAS BEEN POINTED OUT THAT --
2 I THINK MS. FERRERA SAID 3,000 ENTRIES ON OUR PRIVILEGE
3 LOG. IN FACT, THERE ARE ONLY 1,700 OR SO, EVEN ON THE
4 ONE SHE HANDED UP TO YOU. I THINK THERE MIGHT BE A POINT
5 OF CONFUSION IN THE SENSE THAT ORIGINALLY THERE WERE
6 MORE. IT MAY HAVE BEEN ALMOST 3,000. THAT IS BECAUSE WE
7 SERVED OUR PRIVILEGE LOG IN TWO PARTS, THE FIRST
8 PRIVILEGE LOG AND A SUPPLEMENTAL ONE, AND THERE WAS
9 OVERLAP. SOME OF THE FIRST PRIVILEGE LOG WAS MISTAKENLY
10 REPLICATED ON THE SECOND PRIVILEGE LOG AND THERE WERE
11 ONLY ABOUT 1,700 DOCUMENTS ON THE LOG.

12 THAT MAY SOUND LIKE A LOT FOR A PATENT
13 CASE. IT'S PRETTY LOW IN MY EXPERIENCE, AND IN FACT, I
14 WOULD HAVE ONE COPY OF THEIR PRIVILEGE LOG. IT'S DOUBLE
15 SIDED. SO IT'S EVEN BIGGER THAN IT LOOKS, BUT I THINK
16 THERE ARE 4,500 ENTRIES ON THEIR LOG, AND THE ENTRIES ARE
17 OF THE SAME -- ARE OF THE SAME ILK AS OURS IN TERMS OF
18 THE DESCRIPTIONS.

19 THE FIRST ONE, COMMUNICATION BETWEEN OR AMONG
20 PRECISION EMPLOYEES AND OTHER OUTSIDE COUNSEL SOLICITING
21 OR RELAYING LEGAL ADVICE. THEY ARE GIVING THE SAME
22 DESCRIPTION WE GAVE. THAT IS MY EXPERIENCE IN DOING THIS
23 FOR ALMOST 20 YEARS IS THAT YOU TYPICALLY GIVE WHAT YOU
24 GET. BUT WE WERE WILLING TO TALK TO THEM.

25 WE WERE SURPRISED BY THE MOTION. IF THEY HAD

1 SAT DOWN WITH US AND SAID EXACTLY WHAT MS. FERRERA SAID
2 HERE, I QUESTION ENTRY 21, I QUESTION ENTRY 51, 52 AND
3 103 AND 104. WE COULD HAVE LOOKED AT THOSE AND HAD A
4 DISCUSSION BEFORE THE MOTION WAS FILED. I DON'T THINK
5 IT'S FAIR TO SURPRISE US WITH A MOTION THAT IS
6 ESSENTIALLY, AS WE NOTE IN THE BRIEF, CHALLENGING EVERY
7 DOCUMENT ON OUR LOG.

8 I DON'T THINK WE HAVE THE BURDEN OF LOOKING AT
9 EVERY DOCUMENT ON THE LOG JUST BECAUSE THEY BELIEVE SOME
10 OF THEM MAY NOT BE PRIVILEGED. NOTWITHSTANDING THAT,
11 EVEN AFTER GETTING THE MOTION, WE DID TAKE A LOOK AT THE
12 DOCUMENTS THAT IDENTIFIED ONE OR MORE OF THE INDIVIDUALS
13 THAT THEY QUESTIONED IN THEIR MOTION, AND AS A RESULT OF
14 THAT, THERE WERE SOME DOCUMENTS THAT WE PRODUCED AND SOME
15 OF THOSE RELATED TO BUSINESS ADVICE THAT ARGUABLY WAS NOT
16 LEGAL ADVICE. WE PRODUCED THAT IN AN ABUNDANCE OF
17 CAUTION.

18 ON THE ISSUE OF CONTROL, AS I SAID, CELLECTIS
19 HASN'T WITHHELD ANYTHING. CELLECTIS LOOKED AT THE
20 DOCUMENT REQUEST, SCHEDULED WHAT IT BELIEVED TO BE
21 PRIVILEGED IN GOOD FAITH, PRODUCED WHAT WAS RESPONSIVE
22 AND NOT PRIVILEGED. WE ARE NOT WITHHOLDING ANYTHING.
23 THERE IS NO BASIS FOR THAT ALLEGATION.

24 IN TERMS OF CONTROL OVER THE PROSECUTION, THEY
25 CITED DR. CHOULIKA'S TESTIMONY IN THEIR OPENING BRIEF

1 WITH A SUGGESTION THAT SOMEHOW CELLECTIS CONTROLLED THE
2 PROSECUTION. WHEN YOU ACTUALLY LOOK AT THE TESTIMONY,
3 DR. CHOULIKA SAYS WE HAVE AN EXCLUSIVE LICENSE, SO WE
4 HAVE CONTROL OF THE PATENTS IN THAT SENSE.

5 THEN THEY ASKED HIM DIRECTLY, DO YOU CONTROL
6 THE PROSECUTION. HE SAID, I DON'T KNOW WHAT YOU MEAN BY
7 THAT, AND THERE WAS NO FOLLOW-UP QUESTION. SO THERE IS
8 NO EVIDENCE THAT CELLECTIS CONTROLS THE PROSECUTION. WE
9 DON'T HAVE CONTROL OVER THOSE DOCUMENTS.

10 BUT EVEN SETTING ASIDE THAT LACK OF CONTROL
11 OVER THE PROSECUTION, I DISAGREE WITH MS. FERRERA'S
12 SUMMARY OF THE DUPLAN CASE. IN THAT CASE, THE COURT DID
13 RELY ON ARTICLE 378 OF THE FRENCH PENAL STATUTE WITH
14 REGARD TO DESCRIBING THE PRIVILEGE TO FRENCH PATENT
15 AGENTS WHO ARE UNDER AN OBLIGATION OF SECRECY IN TERMS OF
16 BUSINESS INFORMATION OR PROFESSIONAL INFORMATION RECEIVED
17 FROM THEIR CLIENTS, AND IT DID FIND SOME OF THE
18 COMMUNICATIONS BETWEEN A FRENCH PATENT AGENT AND CLIENT
19 WERE PRIVILEGED AND HE WOULD ACCORD THAT PRIVILEGE IN THE
20 U.S. ARTICLE.

21 THAT ARTICLE 3778 WAS SUPERSEDED BY AND
22 INCORPORATED INTO ORDER 2000-916. THIS IS AT D.E. 118,
23 AND NOW IT'S EXPRESSED THAT FRENCH PATENT AGENTS ARE
24 COVERED BY THAT OBLIGATION OF SECRECY WHICH SHOULD ACCORD
25 THEM A PRIVILEGE.

1 WITH RESPECT TO -- AND THIS IS WHY THE MEET
2 AND CONFER AND GOING THROUGH THE LIST OF ACTUALLY
3 CHALLENGED DOCUMENTS WOULD HAVE BEEN SO HELPFUL HERE.
4 YOU CAN'T LOOK AT A DOCUMENT AND SAY THAT PERSON IS A
5 FRENCH PERSON AND THAT PERSON IS A FRENCH PERSON AND
6 THEREFORE THERE IS NO BASIS FOR PRIVILEGE. THERE HAS TO
7 BE MORE TO IT. IT COULD BE THAT THOSE TWO FRENCH PEOPLE
8 ARE DISCUSSING FOR THE PURPOSE OF THEIR COMPANY
9 CONFIDENTIAL U.S. LEGAL ADVICE FROM THEIR ATTORNEYS.
10 THERE IS PLENTY OF BASIS FOR ASSERTING PRIVILEGE, BUT I
11 CAN'T DO IT IN ABSTRACT. I NEED THE OPPORTUNITY TO
12 CONFER WITH OPPOSING COUNSEL AND GO THROUGH PIECE BY
13 PIECE, AND THAT IS WHAT SEEMED TO HAVE OCCURRED IN THE
14 BURROUGHS WELLCOME CASE THAT JUDGE HOWARD HANDLED BECAUSE
15 HE LOOKED AT 300 DOCUMENTS AND ANALYZED THE LAW WITH
16 RESPECT TO WHERE EACH OF THE DOCUMENTS EMANATED FROM.
17 THE U.K., NO WAY, BUT HE LOOKED AT THE LAW WITH REGARD TO
18 EACH COUNTRY AND EACH DOCUMENT. WE DIDN'T HAVE THAT
19 OPPORTUNITY.

20 THE COURT: DRIVE ON. I UNDERSTAND THE POINT.

21 MR. RICHTER: IF WE CAN GO TO THE NEXT SLIDE,
22 PLEASE. THIS IS JUST LARGELY SUMMARY OF WHAT I SAID,
23 THAT THERE IS PLENTY OF BASIS FOR ASSERTING PRIVILEGE
24 IRRESPECTIVE OF WHETHER THERE IS AN ATTORNEY NAMED IN A
25 DOCUMENT. I THINK THAT IS BEYOND DISPUTE. YOU CAN'T SAY

1 BASED ON THE PRIVILEGE LOG THAT IT'S NOT PRIVILEGED
2 BECAUSE IT DOESN'T NAME A U.S. ATTORNEY, AND I THINK WE
3 NEED THE OPPORTUNITY TO HANDLE THAT ON A POINT BY POINT
4 BASIS IF THEY ARE GOING TO CHALLENGE ANY SPECIFIC REQUEST
5 OR ANY SPECIFIC DOCUMENT ON THE LOG.

6 IF YOU WOULD GO TO SLIDE 22, PLEASE.

7 CELLECTIS BELIEVES, FROM ITS PERSPECTIVE, THAT INSTITUT
8 PASTEUR HAS COOPERATED. PASTEUR, IN FACT, WAS THE
9 FIRST -- IT'S NOT A PARTY TO THE SUIT, BUT IT WAS THE
10 FIRST ENTITY TO PRODUCE ANYTHING OF RELEVANCE IN THIS
11 LAWSUIT WHEN IT PRODUCED OVER 5,000 PAGES OF LABORATORY
12 NOTEBOOKS BACK IN 2008, AND THOSE NOTEBOOKS RELATE TO THE
13 WORK THAT LED TO THE PATENTS-IN-SUIT.

14 AS I SAID, I HAVE BEEN DOING THIS 20 YEARS.
15 THAT IS TYPICALLY THE MOST CRITICAL INFORMATION IN ANY
16 PATENT LAWSUIT. YOU WANT TO SEE THE INVENTORY,
17 LABORATORY NOTEBOOKS, AND WHAT WAS DONE BEFORE THE PATENT
18 FILING WAS MADE. THIS IS A U.S. LAWSUIT. SO, NATURALLY,
19 THE FINNEGAN FIRM WHICH PROSECUTED THE PATENTS-IN-SUIT
20 WOULD HAVE THE MOST RELEVANT DOCUMENTS ON THAT
21 PRODUCTION, AND THEY PRODUCED THEM, ABOUT 6,700 PAGES OF
22 DOCUMENTS. THERE IS A LOT OF PRIVILEGES THERE. I DON'T
23 THINK PRECISION DISPUTES THAT PASTEUR, THROUGH FINNEGAN,
24 IS ENTITLED TO ASSERT PRIVILEGE OVER ITS U.S. LAWYERS.

25 DR. DUJON, THE LEAD NAME INVENTOR AND

1 SCIENTIST AT PASTEUR WHO DEVELOPED THIS, ALONG WITH DR.
2 CHOULIKA, HE HAD NO OBLIGATION TO COME TO TESTIFY IN THIS
3 CASE. HE HAS NO -- THERE IS NOTHING RIDING ON THE CASE
4 FOR HIM. AS FAR AS I KNOW, HE HAS NO MONETARY INTERESTS.
5 HE SHOWED UP IN THE NEW YORK VOLUNTARILY FOR A U.S. STYLE
6 DEPOSITION. THAT IS FAR MORE INFORMATIVE TO THE
7 DEFENDANT THAN ANY HAGUE CONVENTION DEPOSITION I HAVE
8 EVER BEEN AT.

9 I DON'T KNOW IF YOUR HONOR HAS HAD THE
10 EXPERIENCE OF BEING TO A HAGUE CONVENTION DEPOSITION. I
11 HAVE. I HAVE BEEN IN COUNTRIES WHERE THE WITNESS TAKES
12 THE STAND AND GIVES TESTIMONY IN FRONT OF THE JUDGE AND
13 THAT IS NOT THE RECORD. THE JUDGE SAYS HERE IS WHAT THE
14 WITNESS SAID. HERE IS THE TESTIMONY, I AM GOING TO TELL
15 YOU WHAT HIS TESTIMONY IS. SO THEY HAVE HAD A
16 FREE-FLOWING U.S. DEPOSITION WITH DR. DUJON VOLUNTARILY.

17 DR. FAIRHEAD, ANOTHER INVENTOR AND PASTEUR
18 SCIENTIST, SHE AGREED TO VOLUNTARILY APPEAR FOR HER
19 DEPOSITION ON DECEMBER 10. A FEW DAYS BEFORE THAT DAY,
20 THEY CANCELED THE DEPOSITION. THEY COULD HAVE TAKEN HER
21 DEPOSITION. SHE WAS READY TO GO.

22 DR. BERNEMAN, FORMERLY IN THE PASTEUR PATENT
23 DEPARTMENT, SHE AGREED TO SHOW UP FEBRUARY 10 IN NEW YORK
24 OF THIS YEAR VOLUNTARILY FOR HER DEPOSITION. THEY
25 CANCELED AT THE LAST MINUTE. THERE IS A LOT OF DISCOVERY

1 THEY HAVE AVOIDED THROUGH CANCELLATION OF DEPOSITION.
2 DR. BERNEMAN WAS IN THE PASTEUR PATENT DEPARTMENT WHEN
3 THE PATENT WAS FILED. YOU CAN'T SAY WE WERE NOT GIVING
4 INFORMATION WHEN SHE WAS WILLING TO SHOW UP FOR THE
5 DEPOSITION IN NEW YORK AND THEY WOULDN'T TAKE THE
6 DEPOSITION.

7 IF YOU WOULD TURN TO THE NEXT SLIDE, PLEASE.
8 THE OTHER CONCERN THAT CELLECTIS HAS WITH RESPECT TO THE
9 MOTION, YOUR HONOR, IS THAT, AS I MENTIONED, THERE ARE 13
10 MEMBERS OF THE PATENT FAMILY. IT'S NOT JUST THE TWO
11 PATENTS IN THE SUIT. THERE ARE 11 OTHER PATENTS. AS YOU
12 KNOW FROM EXHAUSTIVE ARGUMENT EARLIER THIS MORNING, FOUR
13 OF THE PATENTS ARE NOW IN REEXAMINATION -- THE TWO
14 DIFFERENT, BUT UNRELATED, AND THE TWO PATENTS-IN-SUIT.

15 THERE HAS BEEN A LETTER WRITING CAMPAIGN WITH
16 CELECTIS WITH COPIES TO PASTEUR STARTING LAST SEPTEMBER
17 WHERE PRECISION HAS INDICATED THAT THEY ARE GOING TO TRY
18 TO REEXAMINE ALL OF THE PATENTS IN THE 13 MEMBER FAMILY,
19 AND BEYOND THAT, ANY PATENTS YOU HAVE. SO PASTEUR AND
20 CELECTIS, IF YOU HAVE ANY PATENTS ON ANYTHING, WE ARE
21 COMING AFTER THAT ON REEXAMINATION. THAT IS WHAT THEY
22 HAVE TOLD THEM IN WRITING A BUNCH OF TIMES, AND FROM
23 CELECTIS' STANDPOINT, THAT IS FINE.

24 WE ARE IN LITIGATION. I CAN ONLY ASSUME -- I
25 DON'T KNOW -- BUT I CAN ONLY ASSUME WHAT PASTEUR WOULD

1 THINK WHEN SOMEONE SAID YOU BETTER VOLUNTARILY COOPERATE,
2 I AM NOT GETTING ENOUGH COOPERATION OUT OF YOU. AT THE
3 SAME TIME, THEY ARE SAME SAYING, I AM GOING AFTER EVERY
4 SINGLE ONE OF THE PATENTS. THEY AGREED TO VOLUNTARILY
5 COOPERATE WITH REGARD TO THE TWO PATENTS-IN-SUIT WITH
6 REASONABLE DISCOVERY REQUESTS.

7 THERE IS A BIG DIFFERENCE BETWEEN THAT AND
8 SAYING HAND OVER EVERYTHING YOU HAVE GOT ON THAT PATENT
9 FAMILY, AND BY THE WAY, I AM GOING AFTER ALL THE PATENTS
10 IN THE PATENT OFFICE. THOSE TWO THINGS ARE COMPLETELY
11 DIAMETRICALLY OPPOSED.

12 THE COURT: I UNDERSTAND, MR. RICHTER. DRIVE
13 ON. I HEAR YOUR POINT.

14 MR. RICHTER: THAT IS LARGELY IT, YOUR HONOR.
15 I WOULD SAY WE HAVEN'T WITHHELD ANYTHING. EVERYTHING ON
16 THE PRIVILEGE LOG IS PROPERLY DISCUSSED. WE WERE WILLING
17 TO DISCUSS IT. WE DON'T BELIEVE WE HAD THE OPPORTUNITY.

18 AND THE REMAINING SLIDES ARE LARGELY ON THE
19 INEQUITABLE CONDUCT WHICH WE DISPUTE AND WHICH I
20 ADDRESSED DURING THE MOTION TO STAY.

21 MY FINAL NOTE IS SIMPLY THAT -- WELL, I THINK
22 I WILL STOP WITH THAT. THANK YOU, YOUR HONOR.

23 THE COURT: MS. LI MADE THE TROUBLE OF GOING
24 UP THERE. SO WHAT -- YOU DON'T HAVE TO, BUT MS. FERRERA
25 WAS MAKING NOTES, AND MS. LI, SO I WOULD SAY I HAVE GREAT

1 CONFIDENCE ON BOTH OF THE COLLEAGUES.

2 MR. RICHTER: IT IS A GOOD POINT, AND I WILL
3 SAY HERE THAT THE POINT OF THE NOTE IS THAT THEY AGREED
4 TO COOPERATE WITH VOLUNTARY DISCOVERY. WITH REASONABLE
5 REQUESTS, PEOPLE WERE WILLING TO COME HERE. DR. DUJON
6 DID COME HERE. IF THEY DIDN'T THINK THEY WERE GETTING
7 THAT LEVEL OF COOPERATION THAT THEY ANTICIPATED, THEY
8 DIDN'T ATTEMPT TO GET IT ANY OTHER WAY. THEY DIDN'T TRY
9 TO GO TO THE HAGUE.

10 THE COURT: MS. FERRERA, DO YOU WANT TO
11 BRIEFLY RESPOND? MS. FERRERA, I AM GOING TO CUT TO THE
12 CHASE. I AM MOST CONCERNED BY THE PLAINTIFF'S PRIMARY
13 ARGUMENT THAT THE SPECIFIC DISPUTES WEREN'T IDENTIFIED
14 AND THAT IS TROUBLING TO ME IN TRYING TO DRAFT ANY ORDER
15 ADDRESSING YOUR CONCERNs.

16 MS. FERRERA: AND I THINK, YOUR HONOR, ON THAT
17 POINT WHERE IT'S WHETHER IT'S 3,000 ENTRIES OR 1,700
18 ENTRIES ON THE PRIVILEGE LOG, I DON'T THINK THAT -- THOSE
19 ARE BOTH BIG NUMBERS, AND THE ISSUE IS NOT THAT IT WAS
20 ONE DOCUMENT OR FIVE DOCUMENTS OR TEN DOCUMENTS THAT WERE
21 A PROBLEM. THERE ARE HUNDREDS OF ENTRIES ON THE
22 PRIVILEGE LOG THAT IMPLICATE THE PRIVILEGE CONCERNs THAT
23 WE ARE TALKING ABOUT HERE.

24 THE COURT: BUT FOR ME TO RULE, I HAVE TO KNOW
25 WHICH DOCUMENTS AND THE SPECIFIC ISSUES BECAUSE I DON'T

1 KNOW ANY OF THESE PEOPLE. IT MAKES IT VERY DIFFICULT
2 WITHOUT IDENTIFYING WITH SPECIFICITY EXACTLY WHAT YOU
3 ASSERT IS NOT SUBJECT TO THE PRIVILEGE.

4 MS. FERRERA: WELL, I THINK, YOUR HONOR, WHERE
5 THE DISPUTE BETWEEN THE PARTIES IS WHETHER OR NOT A
6 PRIVILEGE APPLIES TO FOREIGN PATENT AGENTS OR FOREIGN
7 IN-HOUSE COUNSEL, CELLECTIS' POSITION, WHICH THEY HAVE
8 STATED IN THEIR BRIEFS, IS THAT THERE IS A PRIVILEGE FOR
9 THOSE INDIVIDUALS.

10 OUR POSITION IS THAT THERE IS NOT, AND I THINK
11 IF YOU RULE ON THAT ISSUE, THAT WILL CUT THROUGH A LOT OF
12 THE INDIVIDUAL QUESTIONS ON THE DOCUMENTS, AND IF THERE
13 ARE STILL SPECIFIC DOCUMENTS THAT BASED ON THAT GUIDANCE
14 FROM YOUR HONOR ABOUT WHETHER OR NOT THERE IS A PRIVILEGE
15 THAT APPLIES TO THOSE INDIVIDUALS, IF THERE ARE STILL
16 DOCUMENTS THAT WE HAVE DISPUTE ABOUT, THEN WE CAN ATTEMPT
17 TO NARROW IT FURTHER. BUT AT THIS POINT, IT'S A
18 FUNDAMENTAL DISPUTE ABOUT WHETHER OR NOT THERE IS A
19 PRIVILEGE THAT APPLIES TO THOSE COMMUNICATIONS WHERE
20 THERE IS NO, ON THE FACE OF IT, NO U.S. PATENT ATTORNEY
21 INVOLVED THAT WOULD OTHERWISE CREATE A PRIVILEGE.

22 SO I DON'T THINK IT'S NECESSARILY NECESSARY
23 FOR YOU TO REVIEW INDIVIDUAL ENTRIES BECAUSE THIS IS A
24 BLANKET -- THIS IS A MORE FUNDAMENTAL DISPUTE ABOUT
25 WHETHER THERE IS A PRIVILEGE.

1 THE COURT: I WANT TO LET MR. RICHTER RESPOND
2 TO THAT SPECIFIC ISSUE, IF YOU ARE PREPARED TO.

3 MR. RICHTER: THE DIFFICULTY I HAVE WITH THAT
4 ISSUE IS JUST THIS. I THINK THE CASE LAW, IF IT SHOWS
5 ANYTHING WITH REGARD TO FOREIGN PATENTS, PROVIDES THAT IT
6 IS COUNTRY BY COUNTRY, AND I THINK THAT IS THE ANALYSIS
7 THAT JUDGE HOWARD WENT THROUGH.

8 I DON'T BELIEVE THERE IS A UNIFORM LAW THAT
9 SAYS PATENT AGENTS IN EVERY SINGLE COUNTRY IN THE WORLD
10 ARE NOT ENTITLED TO A PRIVILEGE. I THINK YOU LOOK AT THE
11 LAW OF THE COUNTRY AND ANALYZE IT COUNTRY BY COUNTRY.

12 MS. FERRERA: YOUR HONOR, I HAVE TO DISAGREE
13 WITH THAT. I THINK WHAT THE DUPLAN CASE SAYS AND WHAT
14 THE BURROUGHS WELLCOME CASE SAYS WITH RESPECT TO THE
15 ISSUE OF PATENT PROSECUTION OF U. S. PATENT APPLICATIONS,
16 FOREIGN PATENTS, AGENTS, JUST LIKE U.S. PATENT AGENTS, DO
17 NOT CREATE A PRIVILEGE. YOU HAVE TO LOOK AT INDIVIDUAL
18 COUNTRY'S LAWS TO DETERMINE WHETHER THERE IS ANY
19 PRIVILEGE. THAT ONLY ARISES WHEN A COMMUNICATION IS AT
20 ISSUE, ARE COMMUNICATIONS RELATING TO PROSECUTION OF
21 PATENTS IN THOSE FOREIGN COUNTRIES.

22 AND THAT IS WHAT THE DUPLAN CASE AND THAT IS
23 THE PORTION OF THE DECISION THAT MR. RICHTER RELIED UPON
24 EARLIER. THAT IS WHAT THE JUDGE IN THAT CASE WAS TALKING
25 ABOUT. THAT IS NOT AN ISSUE HERE BECAUSE CELLECTIS HAS

1 SAID THERE ARE NO FOREIGN APPLICATIONS WE ARE TALKING
2 ABOUT. THESE ARE ALL U.S. PATENT APPLICATIONS.

3 THE COURT: MR. RICHTER, I WOULD GIVE YOU A
4 CHANCE TO RESPOND. MS. FERRERA, DRIVE ON.

5 MS. FERRERA: JUST TO CLOSE THE LOOP ON THIS
6 ISSUE ABOUT WHETHER OR NOT YOU NEED ADDITIONAL GUIDANCE
7 IN TERMS OF PARTICULAR DOCUMENTS, IF YOU THINK THAT WOULD
8 BE HELPFUL, WE WOULD BE HAPPY TO MEET AND CONFER WITH
9 CELLECTIS AND REPORT BACK WITHIN THE NEXT TEN DAYS,
10 ALTHOUGH AS I INDICATED, I THINK THERE IS A FUNDAMENTAL
11 ISSUE THAT COULD BE RESOLVED AND THAT WOULD HELP IN
12 NARROWING THAT ISSUE.

13 IN ADDITION, YOUR HONOR, CELLECTIS ATTEMPTS TO
14 MAKE THIS ARGUMENT BASED ON THE DISQUALIFICATION MOTION
15 THAT IT FILED RECENTLY. I AM NOT GOING TO GET INTO THE
16 MERITS OF THAT MOTION, YOUR HONOR. THAT IS NOT BEFORE
17 THE COURT TODAY.

18 HOWEVER, I WILL SAY THAT THEIR ARGUMENT
19 APPEARS TO BE THAT BECAUSE WE HAVE STATED THAT CONDUCT,
20 THAT THERE WAS CERTAIN CONDUCT THAT OCCURRED AFTER JULY
21 OF 1998 OR AFTER JANUARY 2000, THAT INFORMATION EARLIER
22 THAN THAT IS NOT RELEVANT AND THAT JUST DOESN'T MAKE ANY
23 SENSE.

24 EVEN IN THE BASIS FOR THE INEQUITABLE CONDUCT,
25 THE NON-DISCLOSURE DIDN'T OCCUR UNTIL AFTER 1998. THERE

1 CERTAINLY MAY BE INFORMATION IN THE FILES OF INSTITUT
2 PASTEUR OR UPMC OR IN CELLECTIS' FILES THAT IS RELEVANT
3 TO THE INEQUITABLE CONDUCT CLAIMS IN TERMS OF WHO KNEW
4 WHAT WHEN THAT PREDATES THE JULY 1998 AND JULY 2000
5 DATES.

6 WITH RESPECT TO THE ISSUE OF THE DOCUMENTS IN
7 THE POSSESSION OF INSTITUT PASTEUR AND UPMC, AGAIN,
8 CELLECTIS MAKES THIS ARGUMENT THAT THERE WAS A MOTION TO
9 DISMISS HEARING. WE DIDN'T RAISE THE MOTION TO COMPEL AT
10 THAT TIME. THE REASON WE DIDN'T RAISE IT, YOUR HONOR, IS
11 BECAUSE WE WERE HOPING THAT WE WOULD PREVAIL ON THE
12 MOTION AND EITHER THE CASE WOULD BE DISMISSED OR THAT THE
13 PATENT HOLDERS WOULD BE ADDED AS PLAINTIFFS TO THE CASE.

14 IF THAT HAD HAPPENED, THEN ALL OF THE ISSUES
15 RELATING TO THE DISCOVERY FROM THOSE PARTIES WOULD HAVE
16 BEEN DEALT WITH EASILY BECAUSE WE WOULD BE ABLE TO SERVE
17 DISCOVERY REQUESTS ON THEM. SO THE MOTION TO COMPEL ONLY
18 BECAME NECESSARY WITH RESPECT TO THOSE DOCUMENTS AFTER
19 THE MOTION TO DISMISS WAS DECIDED.

20 FINALLY, YOUR HONOR, WITH RESPECT TO THE
21 DEPOSITION THAT MR. RICHTER NOTED, DEPOSITIONS OF
22 PROFESSOR DUJON AND DR. FAIRHEAD AND DANIELLE BERNEMAN,
23 PARTICULARLY MS. BERNEMAN, SHE IS, AS MR. RICHTER SAID,
24 SHE IS IN THE PATENT DEPARTMENT OF INSTITUT PASTEUR. SHE
25 CERTAINLY HAS RELEVANT KNOWLEDGE, BUT IT DOES US NO GOOD

1 TO GO FORWARD WITHOUT HER DOCUMENTS. THERE IS NO WAY TO
2 TEST THE ACCURACY IF WE DON'T HAVE DOCUMENTS TO DETERMINE
3 WHETHER OR NOT WHAT SHE SAID IS TRUE.

4 I THINK THAT'S ALL I HAVE AT THIS POINT, YOUR
5 HONOR.

6 THE COURT: ALL RIGHT. MR. RICHTER, YOU ARE
7 CHOMPING AT THE BIT TO SAY SOMETHING.

8 MR. RICHTER: I WILL BE BRIEF, I PROMISE.
9 JUST TO CLARIFY, I THINK DR. BERNEMAN NO LONGER WORKS AT
10 PASTEUR, BUT I BELIEVE SHE WAS IN THE PASTEUR DEPARTMENT,
11 IN CASE THERE IS CONFUSION. I DON'T THINK THAT IS
12 RELEVANT.

13 BUT IN TERMS OF PRIVILEGE, AS I UNDERSTAND, IF
14 I UNDERSTAND CORRECTLY WHAT MS. FERRERA IS SAYING, SHE IS
15 SAYING IF THERE ARE DOCUMENTS FROM A FOREIGN PATENT AGENT
16 WITH RESPECT TO U.S. PROSECUTION, THEY WOULD ARGUE THAT
17 THOSE ARE NOT PRIVILEGED. I DON'T KNOW. I THINK EVEN
18 THAT DEPENDS ON A DOCUMENT BY DOCUMENT ANALYSIS.

19 I AM NOT AWARE OF ANY SUCH DOCUMENTS OFF THE
20 TOP OF MY HEAD. AS I SAID, WE HAVE 1,700 DOCUMENTS ON
21 THE LOG. THEY HAVE 4,500. I DOUBT THEY KNOW THE
22 CONTENTS OF EACH OF THEIR DOCUMENTS ON THEIR LOG EITHER.
23 BUT I CAN THINK OF SCENARIOS WHERE THAT WOULD BE
24 PRIVILEGED IF THAT PERSON WAS WORKING WITH THE U.S.
25 LAWYERS, FOR EXAMPLE.

1 SO YOU CAN'T -- THIS IS NOT AMENABLE TO A
2 BLANKET DETERMINATION OF WHETHER SOMETHING IS PRIVILEGED
3 OR NOT.

4 HAVING SAID THAT, AS BEFORE, WE WELCOME THE
5 OPPORTUNITY TO CONFER ON A DOCUMENT BY DOCUMENT BASIS
6 BECAUSE AS I LOOK AT THE CASE LAW, THAT SEEMS TO HAVE
7 HAPPENED IN VIRTUALLY EVERY INSTANCE OF CITED CASE LAW,
8 AND THE REASON FOR THAT IS BECAUSE PRIVILEGE IS A
9 SPECIFIC INQUIRY AND IT DEPENDS ON THE CONTENTS, AND WE
10 ARE HAPPY TO DO THAT, BUT WE DON'T THINK IT'S FAIR TO
11 SUBJECT US TO A BLANKET ORDER BECAUSE I DON'T THINK YOU
12 CAN CRAFT ONE THAT COVERS ALL 1,700 DOCUMENTS.

13 THANK YOU, YOUR HONOR.

14 THE COURT: THANK YOU, MR. RICHTER. ALL
15 RIGHT. MR. BASSETT, I THINK THAT'S ALL I HAVE ON MY
16 PLATE. DO YOU HAVE ANYTHING ELSE?

17 MR. BASSETT: NOTHING FROM PRECISION.

18 THE COURT: I HAVE SOMETHING ELSE FOR YOU.
19 ALL RIGHT. MR. BASSETT, I AM GOING TO PUT YOU ON THE
20 SPOT BECAUSE YOU HAVE DONE SUCH A GOOD JOB, BUT I AM
21 GOING TO PUT MR. RICHTER AND HIS COLLEAGUES IN THE SAME
22 SPOT.

23 IF I WERE TO DENY THE MOTION TO STAY OR THE
24 MOTION TO STAY WERE TO BE DENIED, WHAT IS A REASONABLE
25 TIME TABLE FOR THE CASE TO PROCEED? AND I HATE TO ASK

1 YOU THAT OFF THE CUFF, BUT HOW WOULD YOU SEE THE CASE?

2 I WILL ALLOW YOU TO CONFER, AND I WOULD ASK
3 THE PLAINTIFFS TO CONFER, ALSO.

4 MR. BASSETT: YOUR HONOR, THE STEPS THAT FROM
5 OUR NOTES WOULD NEED TO BE COMPLETED ARE COMPLETING THE
6 REMAINING FACT DISCOVERY IN LIGHT OF THE MOTION TO
7 COMPEL. WE THINK THAT WOULD REASONABLY TAKE ABOUT A
8 MONTH AND A HALF AFTER THE RULING.

9 CLAIM CONSTRUCTION NEEDS TO BE ARGUED AND
10 DECIDED. OBVIOUSLY, THAT SCHEDULE IS WITHIN THE CONTROL
11 OF THE COURT. WE WOULD SUGGEST THAT THEN THERE ARE THREE
12 ROUNDS OF EXPERT REPORTS. IT WOULD MAKE SENSE TO HAVE
13 THE COURT'S GUIDANCE ON CLAIM CONSTRUCTION BEFORE THE
14 EXPERT REPORTS WERE COMPLETED, BUT AGAIN, DEPENDING ON
15 THE ORDER, WE WOULD THINK THAT A REASONABLE TIME FRAME
16 FOR THE EXPERT DISCOVERY WOULD BE ABOUT THREE MONTHS TO
17 GET THE REPORTS DONE AND HAVE EXPERT DEPOSITIONS.

18 AFTER THAT POINT, WE THINK THERE SHOULD BE A
19 PERIOD OF TIME FOR BRIEFING AND ARGUING OF DISPOSITIVE
20 MOTIONS.

21 THE COURT: HOW LONG DO YOU THINK IT WOULD
22 TAKE? DO YOU THINK IT WOULD TAKE MORE THAN 30 DAYS AFTER
23 THE EXPERTS' DISCOVERY IS DISCLOSED TO PREPARE
24 DISPOSITIVE MOTIONS?

25 MR. BASSETT: I THINK THAT IS A REASONABLE

1 TIME PERIOD TO FILE THE MOTION.

2 THE COURT: BEYOND THAT, I HAVE IT UNDER
3 CONTROL. I AM LOOKING TO SEE WHAT YOU WANT ALONG THAT.
4 SO A MONTH AFTER EXPERT DISCOVERY TO FILE DISPOSITIVE
5 MOTIONS.

6 MR. BASSETT: I THINK THAT IS A PERFECTLY
7 REASONABLE TIME FRAME.

8 THE COURT: ALL RIGHT. MR. RICHTER, SEE IF
9 YOU CAN DO IT AS WELL.

10 MR. RICHTER: I GENERALLY AGREE.

11 THE COURT: WELL, THAT IS ALWAYS GOOD TO HEAR.

12 MR. RICHTER: SO I THINK THE MOST IMPORTANT
13 THING WOULD BE THE MARKMAN HEARING WHICH BECAUSE OF THE
14 WAY THIS CASE IS SET UP UNDER THE NEW LOCAL PATENT RULES,
15 WE HAVE ALREADY DONE THE EXPERT DISCOVERY ON CLAIM
16 CONSTRUCTION, SO YOU CAN HAVE A HEARING RIGHT AWAY ON
17 THAT, WHICH WOULD FACILITATE EXPERTS' DISCOVERY AND
18 DISPOSITIVE MOTION PRACTICE, SO I GENERALLY AGREE WITH
19 THAT.

20 IT SEEMS TO ME THAT THE CASE COULD BE TRIAL
21 READY IN MAYBE SIX MONTHS OR SO MAYBE UNDER THAT KIND OF
22 SCHEDULE.

23 THE COURT: THAT IS ABOUT WHERE MR. BASSETT
24 HAS INDICATED, THE SAME.

25 MR. RICHTER: YES.

1 THE COURT: WELL, ACTUALLY NOT. YOU HAVE --
2 YOU WOULD HAVE DISPOSITIVE MOTIONS IN SIX MONTHS.

3 MR. BASSETT: WE WOULD APPRECIATE THE
4 OPPORTUNITY TO HAVE RULINGS BEFORE.

5 THE COURT: ABSOLUTELY. AND MR. BASSETT,
6 PLEASE, THIS IS NOT MEANT TO TELEGRAPH THAT THE MOTION TO
7 STAY WOULD BE DENIED. I AM TRYING TO GET THE BIG PICTURE
8 ON THAT.

9 DO YOU AGREE WITH MR. RICHTER THAT THE CLAIM
10 CONSTRUCTION, WERE THE MOTION TO STAY TO BE DENIED, THAT
11 I COULD PROCEED FAIRLY EXPEDITIOUSLY, THE MARKMAN HEARING
12 COULD BE HELD WITH REASONABLE NOTICE.

13 MR. BASSETT: ABSOLUTELY, YOUR HONOR.

14 THE COURT: OKAY. THANK YOU. ALL RIGHT. MR.
15 RICHTER AND MR. BASSETT, ANYTHING FURTHER THAT WE CAN DO
16 TODAY TO ASSIST THE PARTIES?

17 MR. RICHTER: NOTHING FROM OUR SIDE.

18 MR. BASSETT: NOTHING FROM US, YOUR HONOR.

19 THE COURT: ALL RIGHT. I AM HOPING TO GET AN
20 ORDER OUT ON THE DEFENDANT'S TWO MOTIONS PRETTY QUICKLY,
21 CERTAINLY BY SOME TIME NEXT WEEK, SO WE WILL HAVE SOME
22 RULING ON THAT.

23 ALL RIGHT. IF THERE IS NOTHING FURTHER, I
24 COMMEND ALL COUNSEL ON THE ARGUMENTS AND APPRECIATE THE
25 THOUGHT YOU PUT INTO THIS MATTER, AND YOU ALL PUT A LOT

1 OF THOUGHT. ALL RIGHT.

2 COURT WILL STAND IN RECESS.

3 (WHEREUPON, THE PROCEEDINGS WERE ADJOURNED.)

4

5

6

7

8

CERTIFICATE

9

10 THIS IS TO CERTIFY THAT THE FOREGOING
11 TRANSCRIPT OF PROCEEDINGS TAKEN IN THE UNITED STATES
12 DISTRICT COURT IS A TRUE AND ACCURATE TRANSCRIPTION OF
13 THE SHORTHAND NOTES OF THE PROCEEDINGS TAKEN BY ME IN
14 MACHINE SHORTHAND AND TRANSCRIBED BY COMPUTER UNDER MY
15 SUPERVISION.

16 DATED THIS 2ND DAY OF JULY, 2010.

17

18

19

/S/ SHARON K. KROEGER
COURT REPORTER

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